

(1) If no interested person files an application for review of the Regional Director's Decision and Order with the Authority within sixty (60) days after the Regional Director's Decision and Order; or

(2) If the Authority does not undertake to grant review of the Regional Director's Decision and Order within sixty (60) days after the filing of a timely application for review;

If no interested person files an application for review of the Regional Director's Decision and Order with the Authority within sixty (60) days after the Regional Director's Decision and Order, or if the Authority does not undertake to grant review of the action of the regional Director's Decision and Order within sixty (60) days after the filing of a timely application for review, the Regional Director's Decision and Order will become final and binding, and the Regional Director will certify to the parties the results of any election held or issue any clarification of unit, amendment of recognition or certification, determination of eligibility for dues allotment, or certification on consolidation of units as required.

The Authority will undertake to grant review of a Decision and Order of a Regional Director upon the timely filing of an application for review only where compelling reasons exist therefor as set forth in the rules and regulations.

The Authority's granting of review upon the timely filing of an application for review of a Regional Director's Decision and Order will not operate as a stay of such action ordered by the Regional Director, unless specifically ordered by the Authority. If the Authority grants review, the Authority may affirm, modify or reverse action reviewed.

II. *Liaison with other governmental agencies.* The General Counsel is authorized and has responsibility, on behalf of the Authority, to maintain appropriate and adequate liaison and arrangements with the Office of the Assistant Secretary of Labor for Labor-Management Relations with reference to the financial and other reports required to be filed with the Assistant Secretary pursuant to section 7120(c) of the Statute and the availability to the Authority and the General Counsel of the contents thereof. The General Counsel is authorized and has responsibility, on behalf of the Authority, to maintain appropriate and adequate liaison with the Federal Mediation and Conciliation Service with respect to functions which may be performed by the Federal Mediation and Conciliation Service.

III. *Personnel.* Under 5 U.S.C. 7105(d), the Authority is authorized to appoint Regional

Directors. In order better to ensure the effective exercise of the duties and responsibilities of the General Counsel described above, the General Counsel is delegated authority to recommend the appointment, transfer, demotion or discharge of any Regional Director. However, such actions may be taken only with the approval of the Authority. In the event of a vacant Regional Director position, the General Counsel may, without the approval of the Authority, detail personnel as acting Regional Director for a total period of up to 120 days commencing on the day the position becomes vacant. If the position remains vacant for more than 120 days, a detail must be approved by the Authority. Other details of personnel to act as Regional Director during periods when there is an incumbent in the position shall be accomplished by the General Counsel without the approval of the Authority. The General Counsel shall have authority to direct and supervise the Regional Directors. Under 5 U.S.C. 7104(f)(3), the General Counsel shall have direct authority over, and responsibility for all employees in the Office of the General Counsel and all personnel of the General Counsel in the field offices of the Authority. This includes full and final authority subject to applicable laws and rules, regulations and procedures of the Office of Personnel Management and the Authority over the selection, retention, transfer, promotion, demotion, discipline, discharge and in all other respects of such personnel except the detail in the event of a vacancy for a period in excess of 120 days, appointment, transfer, demotion or discharge of any Regional Director. Further, the establishment, transfer, or elimination of any Regional Office or non-Regional Office duty location may be accomplished only with the approval of the Authority. The Authority will provide such administrative support functions, including personnel management, financial management and procurement functions, through the Office of Administration of the Authority as are required by the General Counsel to carry out the General Counsel's statutory and prescribed functions.

IV. To the extent that the above-described duties, powers and authority rest by statute with the Authority, the foregoing statement constitutes a prescription and assignment of such duties, powers and authority, whether or not so specified.

[45 FR 3523, Jan. 17, 1980, as amended at 48 FR 28814, June 23, 1983; 61 FR 16043, Apr. 11, 1996]

**PARTS 2474-2499 [RESERVED]**



## CHAPTER XVI—OFFICE OF GOVERNMENT ETHICS

---

### SUBCHAPTER A—ORGANIZATION AND PROCEDURES

<i>Part</i>		<i>Page</i>
2600	Organization and functions of the Office of Government Ethics .....	497
2601	Implementation of Office of Government Ethics statutory gift acceptance authority .....	498
2602	Employee responsibilities and conduct, addendum [Reserved]	
2604	Freedom of Information Act rules and schedule of fees for the production of public financial disclosure reports .....	501
2606	Privacy Act rules .....	513
2608	Testimony by OGE employees relating to official information and production of official records in legal proceedings .....	522
2610	Implementation of the Equal Access to Justice Act	527

### SUBCHAPTER B—GOVERNMENT ETHICS

2634	Executive branch financial disclosure, qualified trusts, and certificates of divestiture .....	535
2635	Standards of ethical conduct for employees of the executive branch .....	590
2636	Limitations on outside earned income, employment and affiliations for certain noncareer employees .....	637
2638	Office of Government Ethics and executive agency ethics program responsibilities .....	644
2640	Interpretation, exemptions and waiver guidance concerning 18 U.S.C. 208 (Acts affecting a personal financial interest) .....	661
2641	Post-employment conflict of interest restrictions	679
2642–2699	[Reserved]	



## SUBCHAPTER A—ORGANIZATION AND PROCEDURES

### PART 2600—ORGANIZATION AND FUNCTIONS OF THE OFFICE OF GOVERNMENT ETHICS

Sec.

2600.101 Mission and history.

2600.102 Contact information.

2600.103 Office of Government Ethics organization and functions.

AUTHORITY: 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

SOURCE: 68 FR 41682, July 15, 2003, unless otherwise noted.

#### § 2600.101 Mission and history.

(a) The U.S. Office of Government Ethics (OGE) was established by the Ethics in Government Act of 1978, Public Law 95-521, 92 Stat. 1824 (1978). OGE exercises leadership in the executive branch of the Federal Government to prevent conflicts of interest on the part of executive branch employees and resolve those conflicts of interest that do occur. In partnership with executive branch departments and agencies, OGE fosters high ethical standards for executive branch employees which, in turn, strengthens the public's confidence that the Government's business is conducted with impartiality and integrity.

(b) Originally an entity within the Office of Personnel Management, OGE became a separate executive branch agency on October 1, 1989, pursuant to section 3 of the Office of Government Ethics Reauthorization Act of 1988, Public Law 100-598, 102 Stat. 3031 (1988). OGE is the supervising ethics office for all executive branch officers and employees pursuant to the Ethics Reform Act of 1989, Public Law 101-194, 103 Stat. 1716 (1989), as amended by Public Law 101-280, 104 Stat. 149 (1990). Additionally, OGE has various responsibilities under Executive Order 12674 of April 12, 1989, "Principles of Ethical Conduct for Government Officers and

Employees" (3 CFR, 1989 Comp., pp. 215-218), as modified by Executive Order 12731 of October 17, 1990 (3 CFR, 1990 Comp., pp. 306-311).

[68 FR 41682, July 15, 2003, as amended at 80 FR 57072, Sept. 22, 2015]

#### § 2600.102 Contact information.

(a) *Address.* OGE is located at 1201 New York Avenue NW., Suite 500, Washington, DC 20005-3917. OGE does not have any regional offices. OGE's general email address is [contactoge@oge.gov](mailto:contactoge@oge.gov).

(b) *Web site.* Information about OGE and its role in the executive branch ethics program as well as copies of publications that have been developed for training, educational and reference purposes are available electronically on OGE's Web site ([www.oge.gov](http://www.oge.gov)). OGE has posted on its Web site various Executive Orders, statutes, and regulations that together form the basis for the executive branch ethics program. The site also contains ethics advisory opinions and letters published by OGE, as well as other pertinent information.

(c) *Telephone numbers.* OGE's main telephone number is 202-482-9300. Persons who are deaf or speech impaired may contact OGE at the following TDD (Telecommunications Device for the Deaf and Speech Impaired) number: 202-482-9293. The main OGE FAX number is 202-482-9237.

[68 FR 41682, July 15, 2003, as amended at 80 FR 57072, Sept. 22, 2015]

#### § 2600.103 Office of Government Ethics organization and functions.

OGE's Director is appointed by the President and confirmed by the Senate for a five-year term. Additional information regarding OGE's organization and functions is available on its Web site at [www.oge.gov](http://www.oge.gov).

[80 FR 57072, Sept. 22, 2015]

**PART 2601—IMPLEMENTATION OF  
OFFICE OF GOVERNMENT ETHICS  
STATUTORY GIFT ACCEPTANCE  
AUTHORITY**

**Subpart A—General Provisions**

Sec.

- 2601.101 Authority.
- 2601.102 Purpose.
- 2601.103 Policy.
- 2601.104 Relationship to other authorities.
- 2601.105 Definitions.

**Subpart B—Guidelines for Solicitation and  
Acceptance of Gifts**

- 2601.201 Delegation.
- 2601.202 Procedure.
- 2601.203 Conflict of interest analysis.
- 2601.204 Conditions for acceptance.

**Subpart C—Accounting Requirements**

- 2601.301 Accounting of gifts.

AUTHORITY: 5 U.S.C. App. (Ethics in Government Act of 1978).

SOURCE: 68 FR 60594, Oct. 22, 2003, unless otherwise noted.

**Subpart A—General Provisions**

**§ 2601.101 Authority.**

Section 2 of the Office of Government Ethics Authorization Act of 1996, amending the Ethics in Government Act of 1978, as codified at 5 U.S.C. app. 403(b), authorizes the Office of Government Ethics (OGE) to accept and utilize gifts for the purpose of aiding or facilitating the work of OGE.

**§ 2601.102 Purpose.**

The purpose of this part is to establish guidelines governing the implementation of OGE's gift authority by defining its scope and application, by prescribing the policies, standards and procedures that govern the solicitation, acceptance and use of gifts, and by setting forth accounting requirements related to the use of this authority.

**§ 2601.103 Policy.**

(a) *Scope.* OGE may use its statutory authority to solicit, accept and utilize gifts to the agency that aid or facilitate the agency's work. The authority to solicit, accept and utilize gifts in-

cludes the authority to receive, administer, spend, invest and dispose of gifts. Gifts to the agency from individuals or organizations can be a useful adjunct to appropriated funds and may enhance the agency's ability to fulfill its mission, as well as further mutually beneficial public/private partnerships, or other useful arrangements or relationships. Such uses of this authority are appropriate provided that solicitation or acceptance of a gift does not compromise the integrity of OGE, its programs or employees.

(b) *Use of gifts.* Gifts to OGE may be used to carry out any activity that furthers the mission, programs, responsibilities, functions or activities of the agency. Gifts may be used to carry out program functions whether or not appropriated funds are available for that purpose, provided that such expenditures are not barred by law or regulation. Gifts may also be used for official travel by employees to events or activities required to carry out the agency's statutory or regulatory functions. Gifts to the agency may also be used for the travel expenses of spouses accompanying employees on official travel, if such travel could be paid for by appropriated funds.

(c) *Sources.* Generally, gifts may be solicited or accepted from any source, including a prohibited source, provided that the standards of this part are met. Gifts generally should be made directly to the agency and not through intermediaries. However, where a gift is offered by an intermediary, both the intermediary and the ultimate source of the gift should be analyzed to determine whether acceptance would be appropriate.

(d) *Endorsement.* Acceptance of a gift pursuant to this part will not in any way be deemed to be an endorsement of the donor, or the donor's products, services, activities, or policies. Letters to a donor expressing appreciation of a gift are permitted.

(e) *Type of gift.* The agency may solicit or accept any gift that is within its statutory authority. However, as a matter of policy, OGE will not solicit or accept gifts of currency pursuant to this part. Donors who offer currency should be advised that the gift may be made by check or money order payable

## Office of Government Ethics

## § 2601.202

to the U.S. Office of Government Ethics.

[68 FR 60594, Oct. 22, 2003, as amended at 80 FR 57072, Sept. 22, 2015]

### § 2601.104 Relationship to other authorities.

(a) This part does not apply to gifts to the agency of:

(1) Travel and travel-related expenses made pursuant to the authority set forth in 31 U.S.C. 1353; or

(2) Volunteer services made pursuant to the authority set forth in 5 U.S.C. 3111.

(b) This part does not apply to gifts to an individual agency employee, including:

(1) Gifts of contributions, awards or other expenses for training made pursuant to the authority set forth in the Government Employees Training Act, 5 U.S.C. 4111;

(2) Gifts made by a foreign government or organization, or representative thereof, pursuant to the authority set forth in 5 U.S.C. 7342;

(3) Gifts made by a political organization that may be accepted by an agency employee who, in accordance with the terms of the Hatch Act Reform Amendments of 1993, at 5 U.S.C. 7323, may take an active part in political management or in political campaigns; or

(4) Gifts made directly or indirectly that an employee may accept in a personal capacity pursuant to the authority set forth in 5 CFR part 2635, subpart B or subpart C.

### § 2601.105 Definitions.

As used in this part:

*Agency* means the U.S. Office of Government Ethics (OGE).

*Authorized agency official* means the Director of OGE or the Director's delegatee.

*Director* means the Director of OGE.

*Employee* means an employee of OGE.

*Gift* means any gift, donation, bequest or devise of money, use of facilities, personal property, or services and may include travel reimbursements or payments for attendance at or participation in meetings or events.

*Money* means currency, checks, money orders or other forms of negotiable instruments.

*Personal property* means all property, tangible or intangible, not defined as real property, and includes stocks and bonds.

*Prohibited source* means any source described in 5 CFR 2635.203(d).

*Services* means all forms of voluntary and uncompensated personal services.

*Use of facilities* means use of space, equipment and all other facilities.

[68 FR 60594, Oct. 22, 2003, as amended at 80 FR 57072, Sept. 22, 2015]

## Subpart B—Guidelines for Solicitation and Acceptance of Gifts

### § 2601.201 Delegation.

(a) The authority to solicit, accept, and utilize gifts in accordance with this part resides with the Director.

(b) The Director may delegate this authority.

(c) Authorities delegated in accordance with paragraph (b) of this section may be redelegated only through a written delegation authorizing an agency employee to solicit or accept specific types of gifts, or a gift for a specific purpose, function, or event.

### § 2601.202 Procedure.

(a) The authorized agency official will have the authority to solicit, accept, refuse, return, or negotiate the terms of acceptance of a gift.

(b) An employee, other than an authorized agency official, will immediately forward all offers of gifts covered by this part regardless of value to an authorized agency official for consideration and will provide a description of the gift offered. An employee will also inform an authorized agency official of all discussions of the possibility of a gift. An employee will not provide a donor with any commitment, privilege, concession or other present or future benefit (other than an appropriate acknowledgment) in return for a gift.

(c) Only an authorized agency official may solicit, accept or decline a gift after making the determination required under the conflict of interest standard in § 2601.203. An authorized

## § 2601.203

agency official may find that, while acceptance of an offered gift is permissible, it is in the interest of the agency to qualify acceptance by, for example, limiting the gift in some way. Approval of acceptance of a gift in-kind after receipt of the gift may be granted as deemed appropriate by the authorized agency official.

(d) Gifts may be acknowledged in writing in the form of a letter of acceptance to the donor. The amount of a monetary gift will be specified. In the case of nonmonetary gifts, the letter will not make reference to the value of the gift. Valuation of nonmonetary gifts is the responsibility of the donor. Letters of acceptance will not include any statement regarding the tax implications of a gift, which remain the responsibility of the donor. No statement of endorsement should appear in a letter of acceptance to the donor.

(e) A gift may be declined by an authorized official orally or in writing. A donor may be advised of the reason why the gift has been declined. A gift may be declined solely as a matter of agency discretion, even though acceptance would not be precluded under the conflict of interest standard in § 2601.203.

(f) A gift of money or the proceeds of a gift will be deposited in an appropriately documented agency fund. A check or money order should be made payable to the “U.S. Office of Government Ethics.”

[68 FR 60594, Oct. 22, 2003, as amended at 80 FR 57073, Sept. 22, 2015]

### § 2601.203 Conflict of interest analysis.

(a) A gift will not be solicited or accepted if the authorized agency official determines that such solicitation or acceptance of the gift would reflect unfavorably upon the ability of the agency, or any employee of the agency, to carry out OGE responsibilities or official duties in a fair and objective manner, or would compromise the integrity or the appearance of the integrity of its programs or any official involved in those programs.

(b) In making the determination required under paragraph (a) of this section, an authorized agency official may be guided by all relevant consider-

## 5 CFR Ch. XVI (1–1–16 Edition)

ations, including, but not limited to the following:

- (1) The identity of the donor;
- (2) The monetary or estimated market value or the cost to the donor;
- (3) The purpose of the gift as described in any written statement or oral proposal by the donor;
- (4) The identity of any other expected recipients of the gift on the same occasion, if any;
- (5) The timing of the gift;
- (6) The nature and sensitivity of any matter pending at the agency affecting the interests of the donor;
- (7) The significance of an individual employee’s role in any matter affecting the donor, if benefits of the gift will accrue to the employee;
- (8) The nature of the gift offered;
- (9) The frequency of other gifts received from the same donor; and
- (10) The agency activity, purpose or need that the gift will aid or facilitate.

(c) An authorized agency official may ask the donor to provide in writing any additional information needed to assist in making the determination under this section. Such information may include a description of the donor’s business or organizational affiliation and any matters that are pending or are expected to be pending before the agency.

[68 FR 60594, Oct. 22, 2003, as amended at 80 FR 57073, Sept. 22, 2015]

### § 2601.204 Conditions for acceptance.

- (a) No gift may be accepted that:
  - (1) Attaches conditions inconsistent with applicable laws or regulations;
  - (2) Is conditioned upon or will require the expenditure of appropriated funds that are not available to the agency;
  - (3) Requires the agency to provide the donor with some privilege, concession or other present or future benefit in return for the gift;
  - (4) Requires the agency to adhere to particular requirements as to deposit, investment, or management of funds donated;
  - (5) Requires the agency to undertake or engage in activities that are not related to the agency’s mission, programs or statutory authorities; or
  - (6) Would reflect unfavorably upon the ability of the agency, or any of its



## Office of Government Ethics

## § 2604.101

employees, to carry out its responsibilities or official duties in a fair and objective manner, or would compromise or appear to compromise the integrity or the appearance of the integrity of its programs or any official involved in those programs.

(b) [Reserved]

NOTE TO § 2601.204: Nothing in this part will prohibit the agency from offering or providing the donor an appropriate acknowledgment of its gift in a publication, speech or other medium.

[68 FR 60594, Oct. 22, 2003, as amended at 80 FR 57073, Sept. 22, 2015]

### Subpart C—Accounting Requirements

#### § 2601.301 Accounting of gifts.

(a) OGE's Designated Agency Ethics Official (DAEO) will ensure that gifts are properly accounted for by following appropriate internal controls and accounting procedures.

(b) The DAEO will maintain an inventory of donated personal property valued at over \$500. The inventory will be updated each time an item is sold, excessed, destroyed or otherwise disposed of or discarded.

(c) The DAEO will maintain a log of all gifts valued at over \$500 accepted pursuant to this part. The log will include, to the extent known:

- (1) The name and address of the donor;
- (2) A description of the gift; and
- (3) The date the gift is accepted.

[68 FR 60594, Oct. 22, 2003, as amended at 80 FR 57073, Sept. 22, 2015]

## PART 2602—EMPLOYEE RESPONSIBILITIES AND CONDUCT, ADDENDUM [RESERVED]

## PART 2604—FREEDOM OF INFORMATION ACT RULES AND SCHEDULE OF FEES FOR THE PRODUCTION OF PUBLIC FINANCIAL DISCLOSURE REPORTS

### Subpart A—General Provisions

Sec.

- 2604.101 Purpose.
- 2604.102 Applicability.
- 2604.103 Definitions.

- 2604.104 Preservation of records.
- 2604.105 Other rights and services.

### Subpart B—FOIA Public Reading Room Facility and Web Site; Index Identifying Information for the Public

- 2604.201 Public reading room facility and Web site.
- 2604.202 Index identifying information for the public.

### Subpart C—Production and Disclosure of Records Under FOIA

- 2604.301 Requests for records.
- 2604.302 Response to requests.
- 2604.303 Form and content of responses.
- 2604.304 Appeal of denials.
- 2604.305 Time limits.

### Subpart D—Exemptions Under FOIA

- 2604.401 Policy.
- 2604.402 Business information.

### Subpart E—Schedule of Fees

- 2604.501 Fees to be charged—general.
- 2604.502 Fees to be charged—categories of requesters.
- 2604.503 Limitations on charging fees.
- 2604.504 Miscellaneous fee provisions.

### Subpart F—Annual OGE FOIA Report

- 2604.601 Electronic posting and submission of annual OGE FOIA report.

### Subpart G—Fees for the Reproduction and Mailing of Public Financial Disclosure Reports

- 2604.701 Policy
- 2604.702 Charges.

AUTHORITY: 5 U.S.C. 552; 5 U.S.C. App. 101–505; E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235; E.O. 13392, 70 FR 75373, 3 CFR, 2005 Comp., p. 216.

SOURCE: 80 FR 57073, Sept. 22, 2015, unless otherwise noted.

### Subpart A—General Provisions

#### § 2604.101 Purpose.

This part contains the regulations of the U.S. Office of Government Ethics (OGE) implementing the Freedom of Information Act (FOIA), as amended. It describes how any person may obtain records from OGE under the FOIA. It also implements section 105(b)(1) of the Ethics in Government Act of 1978 (Ethics Act), as amended, which authorizes an agency to charge reasonable fees to

## § 2604.102

cover the cost of reproduction and mailing of public financial disclosure reports requested by any person.

### § 2604.102 Applicability.

(a) *General.* The FOIA and this rule apply to all OGE records. However, if another law sets forth procedures for the disclosure of specific types of records, such as section 105 of the Ethics in Government Act of 1978, 5 U.S.C. appendix, OGE will process a request for those records in accordance with the procedures that apply to those specific records. See 5 CFR 2634.603 and subpart G of this part. If there is any record which is not required to be released under those provisions, OGE will consider the request under the FOIA and this rule, provided that the special Ethics Act access procedures cited must be complied with as to any record within the scope thereof.

(b) *The relationship between the FOIA and the Privacy Act of 1974.* The Freedom of Information Act applies to third-party requests for documents concerning the general activities of the government and of OGE in particular. The Privacy Act of 1974, 5 U.S.C. 552a, applies to records that are about individuals, but only if the records are in a system of records as defined in the Privacy Act. When an individual requests access to his or her own records that are contained in an OGE system of records, the individual is making a Privacy Act request, not a FOIA request. Although OGE determines whether a request is a FOIA or Privacy Act request, OGE processes requests in accordance with both laws and will not deny access by a first party to a record under the FOIA or the Privacy Act if the record is available to that individual under both statutes. This provides the greatest degree of lawful access while safeguarding individuals' personal privacy.

(c) *Records available through routine distribution procedures.* When the record requested includes material published and offered for sale (e.g., by the Government Publishing Office) or which is available to the public through an established distribution system (such as that of the National Technical Information Service of the Department of Commerce), OGE will explain how the

## 5 CFR Ch. XVI (1–1–16 Edition)

record may be obtained through those channels. If the requester, after having been advised of such alternative access, asks for regular FOIA processing instead, OGE will provide the record in accordance with its usual FOIA procedures under this part.

### § 2604.103 Definitions.

As used in this part:

*Agency* has the meaning given in 5 U.S.C. 551(1) and 5 U.S.C. 552(f).

*Business information* means trade secrets or other commercial or financial information, provided to OGE by a submitter, which arguably is protected from disclosure under Exemption 4 of the Freedom of Information Act.

*Business submitter* means any person who provides business information, directly or indirectly, to OGE and who has a proprietary interest in the information.

*Chief FOIA Officer* means the OGE official designated in 5 U.S.C. 552(k) to provide oversight of all of OGE's FOIA program operations.

*Commercial use* means, when referring to a request, that the request is from, or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or of a person on whose behalf the request is made. Whether a request is for a commercial use depends on the purpose of the request and the use to which the records will be put. When a request is from a representative of the news media, a purpose or use supporting the requester's news dissemination function is not a commercial use.

*Direct costs* means those expenditures actually incurred in searching for and duplicating (and, in the case of commercial use requesters, reviewing) records to respond to a FOIA request. Direct costs include the salary of the employee performing the work and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space and heating or lighting of the facility in which the records are stored.

*Duplication* means the process of making a copy of a record. Such copies include photocopies, flash drives, and optical discs.

*Educational institution* means a pre-school, elementary or secondary school, institution of undergraduate or graduate higher education, or institute of professional or vocational education, which operates a program of scholarly research.

*Fee waiver* means waiving or reducing processing fees if a requester can demonstrate that certain statutory standards are satisfied, including that the information is in the public interest and is not requested for a commercial interest.

*FOIA Officer* means the OGE employee designated to handle various initial FOIA matters, including requests and related matters such as fees.

*FOIA Public Liaison* means the OGE official designated in 5 U.S.C. 552(a)(6)(B)(ii) and 552(l) to review upon request any concerns of FOIA requesters about the service received from OGE's FOIA Requester Service Center and to address any other FOIA-related inquiries.

*FOIA Requester Service Center* means the OGE unit designated under E.O. 13392 and referenced in 5 U.S.C. 552(l) to answer any questions requesters have about the status of OGE's processing of their FOIA requests.

*Freedom of Information Act* or *FOIA* means 5 U.S.C. 552.

*Noncommercial scientific institution* means an institution that is not operated solely for purposes of furthering its own or someone else's business, trade, or profit interests, and that is operated for purposes of conducting scientific research the results of which are not intended to promote any particular product or industry.

*Office or OGE* means the United States Office of Government Ethics.

*Person* has the meaning given in 5 U.S.C. 551(2), including "an individual, partnership, corporation, association, or public or private organization other than an agency."

*Records* means any handwritten, typed, or printed documents (such as memoranda, books, brochures, studies, writings, drafts, letters, transcripts, and minutes) and documentary material in other forms (such as electronic documents, electronic mail, magnetic tapes, cards or discs, paper tapes, audio

or video recordings, maps, photographs, slides, microfilm and motion pictures) that are either created or obtained by OGE and are under its control. It does not include objects or articles such as exhibits, models, equipment, and duplication machines or audiovisual processing materials.

*Representative of the news media* means a person or entity that gathers information of potential interest to a segment of the public, uses editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who distribute their products to the general public or who make their products available for purchase or subscription by the general public, and entities that may disseminate news through other media, such as electronic dissemination of text. Freelance journalists will be considered as representatives of a news media entity if they can show a solid basis for expecting publication through such an entity. A publication contract is such a basis, and the requester's past publication record may show such a basis.

*Request* means any request for records made pursuant to 5 U.S.C. 552(a)(3).

*Requester* means any person who makes a request for records to OGE.

*Requester category* means one of three classifications that OGE assigns to requesters to determine whether OGE will charge fees for search, review and duplication. These categories are: Commercial requesters; noncommercial scientific or educational institutions or representatives of the news media; and all other requesters.

*Review* means the process of initially, or upon appeal (see § 2604.501(b)(3)), examining documents located in a response to a request to determine whether any portion of any document is permitted to be withheld. It also includes processing documents for disclosure, such as redacting portions which

## § 2604.104

## 5 CFR Ch. XVI (1–1–16 Edition)

may be withheld. Review does not include time spent resolving general legal and policy issues regarding the application of exemptions.

*Search* means the time spent looking for material manually or by automated means that is responsive to a request, including page-by-page or line-by-line identification of material within documents.

*Working days* means calendar days, excepting Saturdays, Sundays, and legal public holidays.

### § 2604.104 Preservation of records.

OGE will preserve all correspondence pertaining to the requests that it receives under this part, as well as copies of all responsive records, until disposition or destruction is authorized by title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule. Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit.

### § 2604.105 Other rights and services.

Nothing in this part will be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

## Subpart B—FOIA Public Reading Room Facility and Web Site; Index Identifying Information for the Public

### § 2604.201 Public reading room facility and Web site.

(a)(1) *Location of public reading room facility.* OGE maintains a public reading room facility at its offices located at 1201 New York Avenue NW., Suite 500, Washington, DC 20005–3917. Persons desiring to utilize the reading room facility should contact OGE, in writing or by telephone: 202–482–9300, TDD: 202–482–9293, or FAX: 202–482–9237, to arrange a time to inspect the materials available there.

(2) *Web site.* The records listed in paragraph (b) of this section that were created on or after November 1, 1996, or which OGE is otherwise able to make electronically available, along with the OGE FOIA and Public Records Guide

and OGE's annual FOIA reports, are also available via OGE's Web site ([www.oge.gov](http://www.oge.gov)). OGE will proactively identify additional records of interest to the public and will post such records on its Web site when practicable.

(b) *Records available.* The OGE public reading room facility contains OGE records which are required by 5 U.S.C. 552(a)(2) to be made available for public inspection and copying, including:

(1) Any final opinions, as well as orders, made in the adjudication of cases;

(2) Any statements of policy and interpretation which have been adopted by OGE and are not published in the FEDERAL REGISTER;

(3) Any administrative staff manuals and instructions to staff that affect a member of the public, and which are not exempt from disclosure under section (b) of the FOIA;

(4) Copies of records created by OGE that have been released to any person under subpart C of this part which, because of the nature of their subject matter, OGE determines have become or are likely to become the subject of subsequent requests for substantially the same records, together with a general index of such records; and

(5) A general index of the records referred to under § 2604.201(b)(4).

(c) *Copying.* The cost of copying information available in OGE's public reading room facility will be imposed on a requester in accordance with the provisions of subpart E of this part.

(d) OGE may delete from the copies of materials made available under this section any identifying details necessary to prevent a clearly unwarranted invasion of personal privacy. Any such deletions will be explained in writing and the extent of such deletions will be indicated on the portion of the records that are made available or published, unless the indication would harm an interest protected by the FOIA exemption pursuant to which the deletions are made. If technically feasible, the extent of any such deletions will be indicated at the place in the records where they are made.

### § 2604.202 Index identifying information for the public.

(a) OGE will maintain and make available for public inspection and

copying a current index of the materials available at its public reading room facility which are required to be indexed under 5 U.S.C. 552(a)(2).

(b) The Director of the Office of Government Ethics has determined that it is unnecessary and impracticable to publish quarterly or more frequently and distribute (by sale or otherwise) copies of each index and supplements thereto, as provided in 5 U.S.C. 552(a)(2). The Office will provide copies of such indexes upon request, at a cost not to exceed the direct cost of duplication and mailing, if sending records by other than ordinary mail.

### Subpart C—Production and Disclosure of Records Under FOIA

#### § 2604.301 Requests for records.

(a) *Addressing requests.* Requests for copies of records may be made by mail or email. Requests sent by mail should be addressed to the FOIA Officer, U.S. Office of Government Ethics, 1201 New York Avenue NW., Suite 500, Washington, DC 20005-3917. The envelope containing the request and the letter itself should both clearly indicate that the subject is a Freedom of Information Act request. Email requests should be sent to [usoge@oge.gov](mailto:usoge@oge.gov) and should indicate in the subject line that the message contains a Freedom of Information Act request.

(b) *Description of records.* Each request must reasonably describe the desired records in sufficient detail to enable OGE personnel to locate the records with a reasonable amount of effort. A request for a specific category of records will be regarded as fulfilling this requirement if it enables responsive records to be identified by a technique or process that is not unreasonably burdensome or disruptive of OGE operations.

(1) Wherever possible, a request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record.

(2) If the FOIA Officer determines that a request does not reasonably describe the records sought, the FOIA Officer will either advise the requester what additional information is needed to locate the record, or otherwise state

why the request is insufficient. The FOIA Officer will also extend to the requester an opportunity to confer with OGE personnel with the objective of reformulating the request in a manner which will meet the requirements of this section.

(c) *Agreement to pay fees.* The filing of a request under this subpart will be deemed to constitute an agreement by the requester to pay all applicable fees charged under subpart E of this part, up to \$25.00, unless a waiver of fees is sought. The request may also specify a limit on the amount the requester is willing to spend, or may indicate a willingness to pay an amount greater than \$25.00, if applicable. In cases where a requester has been notified that actual or estimated fees may amount to more than \$25.00, the request will be deemed not to have been received until the requester has agreed to pay the anticipated total fee. If, in the course of negotiating fees, the requester does not respond to correspondence from OGE, OGE will administratively close the FOIA request after 30 calendar days have passed from the date of its last correspondence to the requester.

(d) *Requests for records relating to corrective actions.* No record developed pursuant to the authority of 5 U.S.C. app. 402(f)(2) concerning the investigation of an employee for a possible violation of any provision relating to a conflict of interest will be made available pursuant to this part unless the request for such information identifies the employee to whom the records relate and the subject matter of any alleged violation to which the records relate. Nothing in this subsection will affect the application of subpart D of this part to any record so identified.

(e) *Seeking expedited processing.* (1) A requester may seek expedited processing of a FOIA request if a compelling need for the requested records can be shown.

(2) “Compelling need” means:

(i) Circumstances in which failure to obtain copies of the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

## § 2604.302

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if the request is made by a person primarily engaged in disseminating information.

(3) A requester seeking expedited processing should so indicate in the initial request, and should state all the facts supporting the need to obtain the requested records quickly. The requester must also certify in writing that these facts are true and correct to the best of the requester's knowledge and belief.

### § 2604.302 Response to requests.

(a) *Acknowledgement of requests.* If the FOIA Officer determines that a request will take longer than 10 working days to process, OGE will send a written acknowledgment that includes the requester's individualized tracking number.

(b) *Response to initial request.* The FOIA Officer is authorized to grant or deny any request for a record and to determine appropriate fees.

(c) *Referral to, or consultation with, another agency.* When a requester seeks access to records that originated in another Government agency subject to the FOIA, OGE will normally refer the request to the other agency for response; alternatively, OGE may consult with the other agency in the course of deciding itself whether to grant or deny a request for access to such records. If OGE refers the request to another agency, it will notify the requester of the referral and provide a point of contact within the receiving agency. If release of certain records may adversely affect United States relations with foreign governments, OGE will usually consult with the Department of State. A request for any records classified by some other agency will be referred to that agency for response.

(d) *Honoring form or format requests.* In making any record available to a requester, OGE will provide the record in the form or format requested, if the record already exists or is readily reproducible by OGE in that form or format. If a form or format request cannot be honored, OGE will so inform the requester and provide a copy of a non-exempt record in its existing form or

## 5 CFR Ch. XVI (1–1–16 Edition)

format or another convenient form or format which is readily reproducible. OGE will not, however, generally develop a completely new record (as opposed to providing a copy of an existing record in a readily reproducible new form or format, as requested) of information in order to satisfy a request.

(e) *Record cannot be located.* If a requested record cannot be located from the information supplied, the FOIA Officer will so notify the requester in writing.

### § 2604.303 Form and content of responses.

(a) *Form of notice granting a request.* After the FOIA Officer has made a determination to grant a request in whole or in part, the requester will be notified in writing. The notice will describe the manner in which the record will be disclosed, whether by providing a copy of the record with the response or at a later date, or by making a copy of the record available to the requester for inspection at a reasonable time and place. The procedure for such an inspection may not unreasonably disrupt OGE operations. The response letter will also inform the requester in the response of any fees to be charged in accordance with the provisions of subpart E of this part.

(b) *Form of notice denying a request.* When the FOIA Officer denies a request in whole or in part, the FOIA Officer will so notify the requester in writing. The response will be signed by the FOIA Officer and will include:

(1) The name and title or position of the person making the denial;

(2) A brief statement of the reason or reasons for the denial, including the FOIA exemption or exemptions which the FOIA Officer has relied upon in denying the request;

(3) When only a portion of a document is being withheld, the amount of information deleted and the FOIA exemption(s) justifying the deletion will generally be indicated on the copy of the released portion of the document. If technically feasible, such indications will appear at the place in the copy of the document where any deletion is made. If a document is withheld in its entirety, an estimate of the volume of the withheld material will generally be

## Office of Government Ethics

## § 2604.305

given. However, neither an indication of the amount of information deleted nor an estimation of the volume of material withheld will be included in a response if doing so would harm an interest protected by any of the FOIA exemptions pursuant to which the deletion or withholding is made; and

(4) A statement that the denial may be appealed under § 2604.304, and a description of the requirements of that section.

### § 2604.304 Appeal of denials.

(a) *Right of appeal.* If a request has been denied in whole or in part, the requester may appeal the denial by mail or email to the Program Counsel of the U.S. Office of Government Ethics. Requests sent by mail should be addressed to 1201 New York Avenue NW., Suite 500, Washington, DC 20005-3917. The envelope containing the request and the letter itself should both clearly indicate that the subject is a Freedom of Information Act appeal. Email requests should be sent to [usoge@oge.gov](mailto:usoge@oge.gov) and should indicate in the subject line that the message contains a Freedom of Information Act appeal.

(b) *Letter of appeal.* The appeal must be in writing and must be sent within 45 calendar days of receipt of the denial letter. An appeal should include a copy of the initial request, a copy of the letter denying the request in whole or in part, and a statement of the circumstances, reasons or arguments advanced in support of disclosure of the record.

(c) *Action on appeal.* The disposition of an appeal will be in writing and will constitute the final action of OGE on a request. A decision affirming in whole or in part the denial of a request will include a brief statement of the reason or reasons for affirmance, including each FOIA exemption relied on. If the denial of a request is reversed in whole or in part on appeal, the request will be processed promptly in accordance with the decision on appeal.

(d) *Judicial review.* If the denial of the request for records is upheld in whole or in part, OGE will notify the person making the request of the right to seek judicial review under 5 U.S.C. 552(a)(4).

(e) *Dispute Resolution Services.* If the denial of the request for records is

upheld in whole or in part, OGE will notify the requester about the dispute resolution services offered by the Office of Government Information Services (OGIS) and provide contact information for that office.

### § 2604.305 Time limits.

(a)(1) *Initial request.* Following receipt of a request for records, the FOIA Officer will determine whether to comply with the request and will notify the requester in writing of the determination within 20 working days.

(2) *Tolling.* OGE may toll the 20-working day period once while awaiting a response to information reasonably requested from the requester. OGE may also toll the 20-working day period while awaiting a response to a request for clarification regarding fees. There is no limit on the number of times OGE may toll the statutory time period to request clarification regarding fees. In either case, the tolling period ends upon receipt of the requester's response to the request for information or clarification. If OGE does not receive a response to a request for clarification regarding fees within 30 calendar days, it will consider the request "closed."

(3) *Request for expedited processing.* When a request for expedited processing under § 2604.301(e) is received, the FOIA Officer will respond within 10 calendar days from the date of receipt of the request, stating whether or not the request for expedited processing has been granted. If the request for expedited processing is denied, any appeal of that decision will be acted upon expeditiously.

(b) *Appeal.* A written determination on an appeal submitted in accordance with § 2604.304 will be issued within 20 working days after receipt of the appeal.

(c) *Extension of time limits.* When additional time is required for one of the reasons stated in paragraph (d) of this section, OGE will, within the statutory 20-working day period, issue written notice to the requester setting forth the reasons for the extension and the date on which a determination is expected to be made. If more than 10 additional working days are needed, the requester will be notified and provided an opportunity to limit the scope of

## § 2604.401

the request or to arrange for an alternative time frame for processing the request or a modified request. To aid the requester, OGE will make available its FOIA Public Liaison to assist in the resolution of any disputes.

(d) For the purposes of paragraph (c) of this section, *unusual circumstances* means that there is a need to:

(1) Search for and collect records from archives;

(2) Search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) Consult with another agency having a substantial interest in the determination of the request, or consult with various OGE components that have substantial subject matter interest in the records requested.

### Subpart D—Exemptions Under FOIA

#### § 2604.401 Policy.

(a) *Policy on application of exemptions.* A requested record will not be withheld from inspection or copying unless it comes within one of the classes of records exempted by 5 U.S.C. 552. In making its determination on withholding, OGE will consider making discretionary disclosures of records exempt under the FOIA whenever disclosure is not prohibited by statute, Executive Order, or regulation and would not foreseeably harm an interest protected by a FOIA exemption.

(b) *Pledge of confidentiality.* Information obtained from any individual or organization, furnished in reliance on a provision for confidentiality authorized by applicable statute, Executive Order or regulation, will not be disclosed to the extent it can be withheld under one of the exemptions. However, this paragraph (b) does not itself authorize the giving of any pledge of confidentiality by any officer or employee of OGE.

(c) *Exception for law enforcement information.* OGE may treat records compiled for law enforcement purposes as not subject to the requirements of the Freedom of Information Act when:

(1) The investigation or proceeding involves a possible violation of criminal law;

## 5 CFR Ch. XVI (1–16 Edition)

(2) There is reason to believe that the subject of the investigation or proceeding is unaware of its pendency; and

(3) The disclosure of the existence of the records could reasonably be expected to interfere with the enforcement proceedings.

(d) *Partial application of exemptions.* Any reasonably segregable portion of a record will be provided to any person requesting the record after deletion of the portions which are exempt under this subpart.

#### § 2604.402 Business information.

(a) *In general.* Business information provided to OGE by a submitter will not be disclosed pursuant to a Freedom of Information Act request except in accordance with this section.

(b) *Designation of business information.* Submitters of business information should use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, those portions of their submissions which they deem to be protected under Exemption 4 of the FOIA (5 U.S.C. 552(b)(4)). Any such designation will expire 10 years after the records were submitted to the Government, unless the submitter requests, and provides reasonable justification for, a designation period of longer duration.

(c) *Predislosure notification.* The FOIA Officer will provide a submitter with prompt written notice of a FOIA request regarding its business information if:

(1) The information has been designated by the submitter as information deemed protected from disclosure under Exemption 4 of the FOIA; or

(2) The FOIA Officer has reason to believe that the information may be protected from disclosure under Exemption 4 of the FOIA. Such written notice will either describe the exact nature of the business information requested or provide copies of the records containing the business information. The requester also will be notified that notice and an opportunity to object are being provided to a submitter.

(d) *Opportunity to object to disclosure.* OGE will give a submitter a reasonable time, up to 10 working days, from receipt of the predislosure notification



## Office of Government Ethics

## § 2604.501

to provide a written statement of any objection to disclosure. Such statement will specify all the grounds for withholding any of the information under any exemption of the FOIA and, in the case of Exemption 4, will demonstrate why the information is deemed to be a trade secret or commercial or financial information that is privileged or confidential. Information provided by a submitter pursuant to this paragraph (d) may itself be subject to disclosure under the FOIA.

(e) *Notice of intent to disclose.* The FOIA Officer will consider all objections raised by a submitter and specific grounds for nondisclosure prior to determining whether to disclose business information. Whenever the FOIA Officer decides to disclose business information over the objection of a submitter, the FOIA Officer will send the submitter a written notice at least 10 working days before the date of disclosure containing:

(1) A statement of the reasons why the submitter's objections were not sustained;

(2) A copy of the records which will be disclosed or a written description of the records; and

(3) A specified disclosure date. The requester will also be notified of the FOIA Officer's determination to disclose records over a submitter's objections.

(f) *Notice of FOIA lawsuit.* Whenever a requester brings suit seeking to compel disclosure of business information, the FOIA Officer will promptly notify the submitter.

(g) *Exceptions to predisclosure notification.* The notice requirements in paragraph (c) of this section do not apply if:

(1) The FOIA Officer determines that the information should not be disclosed;

(2) The information has been published previously or has been officially made available to the public;

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552); or

(4) The designation made by the submitter in accordance with paragraph (b) of this section appears obviously frivolous; except that, in such a case, the FOIA Officer will provide the submitter with written notice of any final

decision to disclose business information within a reasonable number of days prior to a specified disclosure date.

### Subpart E—Schedule of Fees

#### § 2604.501 Fees to be charged—general.

(a) *Policy.* Fees will be assessed according to the schedule contained in paragraph (b) of this section and the category of requesters described in § 2604.502 for services rendered in responding to and processing requests for records under subpart C of this part. All fees will be charged to the requester, except where the charging of fees is limited under § 2604.503(a) and (b) or where a waiver or reduction of fees is granted under § 2604.503(c). Requesters will pay fees by check or money order made payable to the Treasury of the United States.

(b) *Types of charges.* The types of charges that may be assessed in connection with the production of records in response to a FOIA request are as follows:

(1) *Searches*—(i) *Manual searches for records.* Whenever feasible, OGE will charge at the salary rate (*i.e.*, basic pay plus 16%) of the employee making the search. However, where a homogeneous class of personnel is used exclusively in a search (*e.g.*, all clerical time or all professional time) OGE will charge \$16.00 per hour for clerical time and \$28.00 per hour for professional time. Charges for search time will be billed by 15minute segments.

(ii) *Computer searches for records.* Requesters will be charged the actual direct cost of conducting a search using existing programming. These direct costs will include the cost of operating a central processing unit for that portion of operating time that is directly attributable to searching for records responsive to a request, as well as the cost of operator/programmer salary apportionable to the search. OGE will not alter or develop programming to conduct a search.

(iii) *Unproductive searches.* OGE will charge search fees even if no records are found which are responsive to the request, or if the records found are exempt from disclosure.

(2) *Duplication.* The standard copying charge for documents in paper copy is \$0.15 per page. When responsive information is provided in a format other than paper copy, such as in the form of computer tapes, flash drives, and discs, the requester may be charged the direct costs of the medium used to produce the information, as well as any related reproduction costs.

(3) *Review.* Costs associated with the review of documents, as defined in § 2604.103, will be charged at the salary rate (*i.e.*, basic pay plus 16%) of the employee conducting the review. Except as noted below, charges may be assessed only for review at the initial level, *i.e.*, the review undertaken the first time the documents are analyzed to determine the applicability of specific exemptions to a particular record or portion of the records. A requester will not be charged for review at the administrative appeal level concerning the applicability of an exemption already applied at the initial level. However, when a record has been withheld pursuant to an exemption which is subsequently determined not to apply and the record is reviewed again at the appeal level to determine the potential applicability of other exemptions, the costs of such additional review may be assessed.

(4) *Other services and materials.* Where OGE elects, as a matter of administrative discretion, to comply with a request for a special service or materials, such as certifying that records are true copies or sending records by special methods, the actual direct costs of providing the service or materials will be charged.

**§ 2604.502 Fees to be charged—categories of requesters.**

(a) *Fees for various requester categories.* The paragraphs below state, for each category of requester, the type of fees generally charged by OGE. However, for each of these categories, the fees may be limited, waived or reduced in accordance with the provisions set forth in § 2604.503. In determining whether a requester belongs in any of the following categories, OGE will determine the use to which the requester will put the documents requested. If OGE has reasonable cause to doubt the

use to which the requester will put the records sought, or where the use is not clear from the request itself, OGE will seek clarification before assigning the request to a specific category.

(b) *Commercial use requester.* OGE will charge the full costs of search, review, and duplication. Commercial use requesters are not entitled to two hours of free search time or 100 free pages of reproduction as described in § 2604.503(a); however, the minimum fees provision of § 2604.503(b) does apply to such requesters.

(c) *Educational and noncommercial scientific institutions and news media.* If the request is from an educational institution or a noncommercial scientific institution, operated for scholarly or scientific research, or a representative of the news media, and the request is not for a commercial use, OGE will charge only for duplication of documents, excluding charges for the first 100 pages.

(d) *All other requesters.* If the request is not one described in paragraph (b) or (c) of this section, OGE will charge the full and direct costs of searching for and reproducing records that are responsive to the request, excluding the first 100 pages of duplication and the first two hours of search time.

**§ 2604.503 Limitations on charging fees.**

(a) *In general.* Except for requesters seeking records for a commercial use as described in § 2604.502(b), OGE will provide, without charge, the first 100 pages of duplication and the first two hours of search time, or their cost equivalent.

(b) *Minimum fees.* OGE will not assess fees for individual requests if the total charge would be \$10.00 or less.

(c) *Waiver or reduction of fees.* Records responsive to a request under 5 U.S.C. 552 will be furnished without charge or at a reduced charge if a requester can demonstrate that certain statutory standards are satisfied, including that the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester. Requests for a waiver or reduction of

fees will be considered on a case-by-case basis.

(1) In determining whether disclosure is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government, OGE will consider the following factors:

(i) *The subject of the request: Whether the subject of the requested records concerns the operations or activities of the Government.* The subject matter of the requested records, in the context of the request, must specifically and directly concern identifiable operations or activities of the Federal Government. Furthermore, the records must be sought for their informative value with respect to those Government operations or activities;

(ii) *The informative value of the information to be disclosed: Whether the information is likely to contribute to an understanding of Government operations or activities.* The disclosable portions of the requested records must be meaningfully informative on specific Government operations or activities in order to hold potential for contributing to increased public understanding of those operations and activities. The disclosure of information which is already in the public domain, in either a duplicative or substantially identical form, would not be likely to contribute to such understanding, as nothing new would be added to the public record;

(iii) *The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to public understanding.* The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. A requester's identity and qualifications—e.g., expertise in the subject area and ability and intention to convey information to the general public—will be considered; and

(iv) *The significance of the contribution to public understanding: Whether the disclosure is likely to contribute significantly to public understanding of Government operations or activities.* The public's understanding of the subject matter in question, as compared to the level of

public understanding existing prior to the disclosure, must be likely to be significantly enhanced by the disclosure.

(2) In determining whether disclosure of the requested information is not primarily in the commercial interest of the requester, OGE will consider the following factors:

(i) *The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure.* OGE will consider all commercial interests of the requester, or any person on whose behalf the requester may be acting, which would be furthered by the requested disclosure. In assessing the magnitude of identified commercial interests, consideration will be given to the effect that the information disclosed would have on those commercial interests; and

(ii) *The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.* A fee waiver or reduction is warranted only where the public interest can fairly be regarded as greater in magnitude than the requester's commercial interest in disclosure. OGE will ordinarily presume that, where a news media requester has satisfied the public interest standard, the public interest will be served primarily by disclosure to that requester. Disclosure to data brokers and others who compile and market Government information for direct economic return will not be presumed to primarily serve the public interest.

(3) Where only a portion of the requested record satisfies the requirements for a waiver or reduction of fees under this paragraph (c), a waiver or reduction will be granted only as to that portion.

(4) A request for a waiver or reduction of fees must accompany the request for disclosure of records, and should include:

(i) A clear statement of the requester's interest in the documents;

(ii) The proposed use of the documents and whether the requester will derive income or other benefit from such use;

## § 2604.504

## 5 CFR Ch. XVI (1–1–16 Edition)

(iii) A statement of how the public will benefit from release of the requested documents; and

(iv) If specialized use of the documents is contemplated, a statement of the requester's qualifications that are relevant to the specialized use.

(5) A requester may appeal the denial of a request for a waiver or reduction of fees in accordance with the provisions of § 2604.304.

(d) If OGE does not comply with one of the time limits under § 2604.305, it will not assess search fees (or, in the case of a requester described under § 2604.502(c), duplication fees), unless unusual or exceptional circumstances apply, as defined in 5 U.S.C. 552(a)(6)(B) and (C).

### § 2604.504 Miscellaneous fee provisions.

(a) *Notice of anticipated fees in excess of \$25.00.* Where OGE determines or estimates that the fees to be assessed under this section may amount to more than \$25.00, it will notify the requester as soon as practicable of the actual or estimated amount of fees, unless the requester has indicated in advance the willingness to pay fees as high as those anticipated. Where a requester has been notified that the actual or estimated fees may exceed \$25.00, the request will be deemed not to have been received until the requester has agreed to pay the anticipated total fee. A notice to the requester pursuant to this paragraph (a) will include the opportunity to confer with OGE personnel in order to reformulate the request to meet the requester's needs at a lower cost.

(b) *Aggregating requests.* A requester may not file multiple requests, each seeking portions of a document or documents in order to avoid the payment of fees. Where there is reason to believe that a requester, or group of requesters acting in concert, is attempting to divide a request into a series of requests for the purpose of evading the assessment of fees, OGE may aggregate the requests and charge accordingly. OGE will presume that multiple requests of this type made within a 30-calendar day period have been made in order to evade fees. Multiple requests regarding

unrelated matters will not be aggregated.

(c) *Advance payments.* An advance payment before work is commenced or continued will not be required unless:

(1) OGE estimates or determines that the total fee to be assessed under this section is likely to exceed \$250.00. When a determination is made that the allowable charges are likely to exceed \$250.00, the requester will be notified of the likely cost and will be required to provide satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or will be required to submit an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment; or

(2) A requester has previously failed to pay a fee charged in a timely fashion (*i.e.*, within 30 calendar days of the date of the billing). In such cases the requester may be required to pay the full amount owed plus any applicable interest as provided by paragraph (e) of this section, and to make an advance payment of the full amount of the estimated fee before OGE begins to process a new request.

(3) When OGE requests an advance payment of fees, the administrative time limits described in subsection (a)(6) of the FOIA will begin to run only after OGE has received the advance payment.

(d) *Billing and payment.* Normally OGE will require a requester to pay all fees before furnishing the requested records. However, OGE may send a bill along with, or following the furnishing of records, in cases where the requester has a history of prompt payment.

(e) *Interest charges.* Interest charges on an unpaid bill may be assessed starting on the 31st calendar day following the day on which the billing was sent. Interest will be at the rate prescribed in 31 U.S.C. 3717 and will accrue from the date of billing. To collect unpaid bills, OGE will follow the provisions of the Debt Collection Act of 1982, as amended (96 Stat. 1749 *et seq.*) including the use of consumer reporting agencies, collection agencies, and offset.

## Subpart F—Annual OGE FOIA Report

### § 2604.601 Electronic posting and submission of annual OGE FOIA report.

On or before February 1 of each year, OGE will electronically post on its Web site and submit to the Office of Information and Privacy at the United States Department of Justice a report of its activities relating to the Freedom of Information Act (FOIA) during the preceding fiscal year. The report will include the information required by 5 U.S.C. 552(e).

## Subpart G—Fees for the Reproduction and Mailing of Public Financial Disclosure Reports

### § 2604.701 Policy.

Fees for the reproduction and mailing of public financial disclosure reports requested pursuant to section 105 of the Ethics in Government Act of 1978, as amended, and § 2634.603 of this chapter will be assessed according to the schedule contained in § 2604.702. Requesters will pay fees by check or money order made payable to the Treasury of the United States. Except as provided in § 2604.702(d), nothing concerning fees in subpart E of this part supersedes the charges set forth in this subpart for records covered in this subpart.

### § 2604.702 Charges.

(a) *Duplication.* Except as provided in paragraph (c) of this section, copies of public financial disclosure reports requested pursuant to section 105 of the Ethics in Government Act of 1978, as amended, and § 2634.603 of this chapter will be provided upon payment of \$0.15 per page furnished.

(b) *Mailing.* Except as provided in paragraph (c) of this section, the actual direct cost of mailing public financial disclosure reports will be charged for all forms requested. Where OGE elects to comply, as a matter of administrative discretion, with a request for special mailing services, the actual direct cost of such service will be charged.

(c) *Minimum fees.* OGE will not assess fees for individual requests if the total charge would be \$10.00 or less.

(d) *Miscellaneous fee provisions.* The miscellaneous fee provisions set forth in § 2604.504 apply to requests for public financial disclosure reports pursuant to § 2634.603 of this chapter.

## PART 2606—PRIVACY ACT RULES

### Subpart A—General Provisions

Sec.

- 2606.101 Purpose.
- 2606.102 Definitions.
- 2606.103 Systems of records.
- 2606.104 OGE and agency responsibilities.
- 2606.105 Rules for individuals seeking to ascertain if they are the subject of a record.
- 2606.106 OGE employee Privacy Act rules of conduct and responsibilities.

### Subpart B—Access to Records and Accounting of Disclosures

- 2606.201 Requests for access.
- 2606.202 OGE or other agency action on requests.
- 2606.203 Granting access.
- 2606.204 Request for review of an initial denial of access.
- 2606.205 Response to a request for review of an initial denial of access.
- 2606.206 Fees.
- 2606.207 Accounting of disclosures.

### Subpart C—Amendment of Records

- 2606.301 Requests to amend records.
- 2606.302 OGE or other agency action on requests.
- 2606.303 Request for review of an initial refusal to amend a record.
- 2606.304 Response to a request for review of an initial refusal to amend; disagreement statements.

AUTHORITY: 5 U.S.C. 552a, 5 U.S.C. App. (Ethics in Government Act of 1978).

SOURCE: 68 FR 27891, May 22, 2003, unless otherwise noted.

### Subpart A—General Provisions

#### § 2606.101 Purpose.

This part sets forth the regulations of the Office of Government Ethics (OGE) implementing the Privacy Act of 1974, as amended (5 U.S.C. 552a). It

## § 2606.102

governs access, maintenance, disclosure, and amendment of records contained in OGE's executive branch Governmentwide and internal systems of records, and establishes rules of conduct for OGE employees who have responsibilities under the Act.

### § 2606.102 Definitions.

For the purpose of this part, the terms listed below are defined as follows:

*Access* means providing a copy of a record to, or allowing review of the original record by, the data subject or the requester's authorized representative, parent or legal guardian;

*Act* means the Privacy Act of 1974, as amended, 5 U.S.C. 552a;

*Amendment* means the correction, addition, deletion, or destruction of a record or specific portions of a record;

*Data subject* means the individual to whom the information pertains and by whose name or other individual identifier the information is maintained or retrieved;

*He, his, and him* include she, hers and her.

*Office* or *OGE* means the U.S. Office of Government Ethics;

*System manager* means the Office or other agency official who has the authority to decide Privacy Act matters relative to a system of records;

*System of records* means a group of any records containing personal information controlled and managed by OGE from which information is retrieved by the name of an individual or by some personal identifier assigned to that individual;

*Working day* as used in calculating the date when a response is due means calendar days, excepting Saturdays, Sundays, and legal public holidays.

### § 2606.103 Systems of records.

(a) *Governmentwide systems of records.* The Office of Government Ethics maintains two executive branch Governmentwide systems of records: the OGE/GOVT-1 system of records, comprised of Executive Branch Personnel Public Financial Disclosure Reports and Other Name-Retrieved Ethics Program Records; and the OGE/GOVT-2 system of records, comprised of Executive Branch Confidential Financial Disclosure

## 5 CFR Ch. XVI (1-1-16 Edition)

Reports. These Governmentwide systems of records are maintained by OGE, and through Office delegations of authority, by Federal executive branch departments and agencies with regard to their own employees, applicants for employment, individuals nominated to a position requiring Senate confirmation, candidates for a position, and former employees.

(b) *OGE Internal systems of records.* The Office of Government Ethics internal systems of records are under OGE's physical custody and control and are established and maintained by the Office on current and former OGE employees regarding matters relating to the internal management of the Office. These systems of records consist of the OGE/INTERNAL-1 system, comprised of Pay, Leave and Travel Records; the OGE/INTERNAL-2 system, comprised of Telephone Call Detail Records; the OGE/INTERNAL-3 system, comprised of Grievance Records; the OGE/INTERNAL-4 system, comprised of Computer Systems Activity and Access Records; and the OGE/INTERNAL-5 system, comprised of Employee Locator and Emergency Notification Records.

### § 2606.104 OGE and agency responsibilities.

(a) The procedures in this part apply to:

(1) All initial Privacy Act access and amendment requests regarding records contained in an OGE system of records.

(2) Administrative appeals from an Office or agency denial of an initial request for access to, or to amend, records contained in an OGE system of records.

(b) For records contained in an OGE Governmentwide system of records, each agency is responsible (unless specifically excepted by the Office) for responding to initial requests for access or amendment of records in its custody and administrative appeals of denials thereof.

(c) For records and material of another agency that are in the custody of OGE, but not under its control or ownership, OGE may refer a request for the records to that other agency, consult with the other agency prior to responding, or notify the requester that the

other agency is the proper agency to contact.

**§ 2606.105 Rules for individuals seeking to ascertain if they are the subject of a record.**

An individual seeking to ascertain if any OGE system of records contains a record pertaining to him must follow the access procedures set forth at § 2606.201(a) and (b).

**§ 2606.106 OGE employee Privacy Act rules of conduct and responsibilities.**

Each OGE employee involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record covered by the Privacy Act, shall comply with the pertinent provisions of the Act relating to the treatment of such information. Particular attention is directed to the following provisions of the Privacy Act:

(a) *5 U.S.C. 552a(e)(7)*. The requirement to maintain in a system of records no record describing how any individual exercises rights guaranteed by the First Amendment of the Constitution of the United States unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.

(b) *5 U.S.C. 552a(b)*. The requirement that no agency shall disclose any record which is contained in a system of records by any means of communication to any person or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, except under certain limited conditions specified in subsections (b)(1) through (b)(12) of the Privacy Act.

(c) *5 U.S.C. 552a(e)(1)*. The requirement for an agency to maintain in its systems of records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by Executive order.

(d) *5 U.S.C. 552a(e)(2)*. The requirement to collect information to the greatest extent practicable directly

from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs.

(e) *5 U.S.C. 552a(e)(3)*. The requirement to inform each individual asked to supply information to be maintained in a system of records the authority which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary; the principal purpose or purposes for which the information is intended to be used; the routine uses which may be made of the information; and the effects on the individual, if any, of not providing all or any part of the requested information.

(f) *5 U.S.C. 552a(b) and (e)(10)*. The requirement to comply with established safeguards and procedures to ensure the security and confidentiality of records and to protect personal data from any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to an individual on whom information is maintained in a system of records.

(g) *5 U.S.C. 552a(c)(1), (c)(2) and (c)(3)*. The requirement to maintain an accounting of specified disclosures of personal information from systems of records in accordance with established Office procedures.

(h) *5 U.S.C. 552a(e)(5) and (e)(6)*. The requirements to maintain all records in a system of records which are used by the agency in making any determination about an individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination; and to make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes, prior to disseminating any record about an individual to any person other than an agency (unless the dissemination is required by the Freedom of Information Act, 5 U.S.C. 552).

(i) *5 U.S.C. 552a(d)(1), (d)(2) and (d)(3)*. The requirement to permit individuals to have access to records pertaining to themselves in accordance with established Office procedures and to have an

opportunity to request that such records be amended.

(j) *5 U.S.C. 552a(c)(4) and (d)(4)*. The requirement to inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of the Act of any record that has been disclosed to the person or agency if an accounting of the disclosure was made; and, in any disclosure of information about which an individual has filed a statement of disagreement, to note clearly any portion of the record which is disputed and to provide copies of the statement (and if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested) to persons or other agencies to whom the disputed record has been disclosed.

(k) *5 U.S.C. 552a(n)*. The requirement for an agency not to sell or rent an individual's name or address, unless such action is specifically authorized by law.

(l) *5 U.S.C. 552a(i)*. The criminal penalties to which an employee may be subject for failing to comply with certain provisions of the Privacy Act.

## Subpart B—Access to Records and Accounting of Disclosures

### § 2606.201 Requests for access.

(a) *Records in an OGE Governmentwide system of records*. An individual requesting access to records pertaining to him in an OGE Governmentwide system of records should submit a written request, which includes the words “Privacy Act Request” on both the envelope and at the top of the request letter, to the appropriate system manager as follows:

(1) *Records filed directly with OGE by non-OGE employees*: The Deputy Director, Office of Agency Programs, Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005–3917;

(2) *Records filed with a Designated Agency Ethics Official (DAEO) or the head of a department or agency*: The DAEO at the department or agency concerned; or

(3) *Records filed with the Federal Election Commission by candidates for Presi-*

*dent or Vice President*: The General Counsel, Office of General Counsel, Federal Election Commission, 999 E Street, NW., Washington, DC 20463.

(b) *Records in an OGE Internal System of Records*. An individual requesting access to records pertaining to him in an OGE internal system of records should submit a written request, which includes the words “Privacy Act Request” on both the envelope and at the top of the request letter, to the Deputy Director, Office of Administration and Information Management, Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005–3917.

(c) *Content of request*. (1) A request should contain a specific reference to the OGE system of records from which access to the records is sought. Notices of OGE systems of records subject to the Privacy Act are published in the FEDERAL REGISTER, and copies of the notices are available on OGE's Web site at <http://www.usoge.gov>, or upon request from OGE's Office of General Counsel and Legal Policy. A biennial compilation of such notices also is made available online and published by the Office of Federal Register at the GPO Access Web site ([http://www.access.gpo.gov/su\\_docs/aces/PrivacyAct.shtml](http://www.access.gpo.gov/su_docs/aces/PrivacyAct.shtml)) in accordance with 5 U.S.C. 552a(f) of the Act.

(2) If the written inquiry does not refer to a specific system of records, it should include other information that will assist in the identification of the records for which access is being requested. Such information may include, for example, the individual's full name (including her maiden name, if pertinent), dates of employment, social security number (if any records in the system include this identifier), current or last place and date of Federal employment. If the request for access follows a prior request to determine if an individual is the subject of a record, the same identifying information need not be included in the request for access if a reference is made to that prior correspondence, or a copy of the response to that request is attached.

(3) The request should state whether the requester wants a copy of the record, or wants to examine the record in person.



**§ 2606.202 OGE or other agency action on requests.**

A response to a request for access should include the following:

(a) A statement that there is a record or records as requested or a statement that there is not a record in the system of records;

(b) The method of access (if a copy of all the records requested is not provided with the response);

(c) The amount of any fees to be charged for copies of records under § 2606.206 of this part or other agencies' Privacy Act regulations as referenced in that section;

(d) The name, title, and telephone number of the official having operational control over the record; and

(e) If the request is denied in whole or in part, or no record is found in the system, a statement of the reasons for the denial, or a statement that no record has been found, and notice of the procedures for appealing the denial or no record finding.

**§ 2606.203 Granting access.**

(a) The methods for allowing access to records, when such access has been granted by OGE or the other agency concerned are:

(1) Examination in person in a designated office during the hours specified by OGE or the other agency;

(2) Providing photocopies of the records; or

(3) Transfer of records at the option of OGE or the other agency to another more convenient Federal facility.

(b) When a requester has not indicated whether he wants a copy of the record, or wants to examine the record in person, the appropriate system manager may choose the means of granting access. However, the means chosen should not unduly impede the data subject's right of access. A data subject may elect to receive a copy of the records after having examined them.

(c) Generally, OGE or the other agency concerned will not furnish certified copies of records. When copies are to be furnished, they may be provided as determined by OGE or the other agency concerned.

(d) When the data subject seeks to obtain original documentation, the Office and the other agencies concerned

reserve the right to limit the request to copies of the original records. Original records should be made available for review only in the presence of the appropriate system manager or his designee.

NOTE TO PARAGRAPH (d) OF § 2606.203: Section 2071(a) of title 18 of the United States Code makes it a crime to conceal, remove, mutilate, obliterate, or destroy any record filed in a public office, or to attempt to do so.

(e) *Identification requirements*—(1) *Access granted in person*—(i) *Current or former employees*. Current or former employees requesting access to records pertaining to them in a system of records may, in addition to the other requirements of this section, and at the sole discretion of the official having operational control over the record, have their identity verified by visual observation. If the current or former employee cannot be so identified by the official having operational control over the records, adequate identification documentation will be required, e.g., an employee identification card, driver's license, passport, or other officially issued document with a picture of the person requesting access.

(ii) *Other than current or former employees*. Individuals other than current or former employees requesting access to records pertaining to them in a system of records must produce adequate identification documentation prior to being granted access. The extent of the identification documentation required will depend on the type of records to be accessed. In most cases, identification verification will be accomplished by the presentation of two forms of identification with a picture of the person requesting access (such as a driver's license and passport). Any additional requirements are specified in the system notices published pursuant to subsection (e)(4) of the Act.

(2) *Access granted by mail*. For records to be accessed by mail, the appropriate system manager shall, to the extent possible, establish identity by a comparison of signatures in situations where the data in the record is not so sensitive that unauthorized access could cause harm or embarrassment to the individual to whom they pertain. No identification documentation will

be required for the disclosure to the data subject of information required to be made available to the public by 5 U.S.C. 552, the Freedom of Information Act. When, in the opinion of the system manager, the granting of access through the mail could reasonably be expected to result in harm or embarrassment if disclosed to a person other than the individual to whom the record pertains, a notarized statement of identity or some similar assurance of identity may be required.

(3) *Unavailability of identification documentation.* If an individual is unable to produce adequate identification documentation, the individual will be required to sign a statement asserting identity and acknowledging that knowingly or willfully seeking or obtaining access to records about another person under false pretenses may result in a criminal fine of up to \$5,000 under subsection (i)(3) of the Act. In addition, depending upon the sensitivity of the records sought to be accessed, the appropriate system manager or official having operational control over the records may require such further reasonable assurances as may be considered appropriate, e.g., statements of other individuals who can attest to the identity of the data subject. No verification of identity will be required of data subjects seeking access to records which are otherwise available to any person under 5 U.S.C. 552.

(4) *Inadequate identification.* If the official having operational control over the records in a system of records determines that an individual seeking access has not provided sufficient identification documentation to permit access, the official shall consult with the appropriate system manager prior to denying the individual access. Whenever the system manager determines, in accordance with the procedures herein, that access will not be granted, the response will also include a statement of the procedures to obtain a review of the decision to deny access in accordance with § 2606.205.

(f) *Access by the parent of a minor, or legal guardian.* A parent of a minor, upon presenting suitable personal identification as otherwise provided under this section, may access on behalf of the minor any record pertaining to the

minor in a system of records. A legal guardian, upon presentation of documentation establishing guardianship and suitable personal identification as otherwise provided under this section, may similarly act on behalf of a data subject declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction. Minors are not precluded from exercising on their own behalf rights given to them by the Privacy Act.

(g) *Accompanying individual.* A data subject requesting access to his records in a system of records may be accompanied by another individual of the data subject's choice during the course of the examination of the record. The official having operational control of the record may require the data subject making the request to submit a signed statement authorizing the accompanying individual's access to the record.

(h) *Access to medical records.* When a request for access involves medical or psychological records that the appropriate system manager believes requires special handling, the data subject should be advised that the material will be provided only to a physician designated by the data subject. Upon receipt of the designation and upon verification of the physician's identity as otherwise provided under this section, the records will be made available to the physician, who will disclose those records to the data subject.

(i) *Exclusion.* Nothing in these regulations permits a data subject's access to any information compiled in reasonable anticipation of a civil action or proceeding (see subsection (d)(5) of the Act).

(j) *Maximum access.* This regulation is not intended to preclude access by a data subject to records that are available to that individual under other processes, such as the Freedom of Information Act (5 U.S.C. 552) or the rules of civil or criminal procedure, provided that the appropriate procedures for requesting access thereunder are followed.

**§ 2606.204 Request for review of an initial denial of access.**

(a)(1) A data subject may submit a written appeal of the decision by OGE or the other agency to deny an initial request for access to records or a no record response.

(i) For records filed directly with OGE, the appeal must be submitted to the Director, Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917.

(ii) For records in OGE's executive branch Governmentwide systems of records that are filed directly with an agency (including the Federal Election Commission) other than OGE, the appeal must be submitted to the Privacy Act access appeals official as specified in the agency's own Privacy Act regulations or the respective head of the agency concerned if it does not have any Privacy Act regulations.

(2) The words "Privacy Act Appeal" should be included on the envelope and at the top of the letter of appeal.

(b) The appeal should contain a brief description of the records involved or copies of the correspondence from OGE or the agency in which the initial request for access was denied. The appeal should attempt to refute the reasons given by OGE or the other agency concerned in its decision to deny the initial request for access or the no record finding.

**§ 2606.205 Response to a request for review of an initial denial of access.**

(a) If the OGE Director or agency reviewing official determines that access to the records should be granted, the response will state how access will be provided if the records are not included with the response.

(b) Any decision that either partially or fully affirms the initial decision to deny access shall inform the requester of the right to seek judicial review of the decision in accordance with 5 U.S.C. 552a(g) of the Privacy Act.

**§ 2606.206 Fees.**

(a) *Fees for records filed with OGE—(1) Services for which fees will not be charged:*

(i) The search and review time expended by OGE to produce a record;

(ii) The first copy of the records provided; or

(iii) The Office of Government Ethics making the records available to be personally reviewed by the data subject.

(2) *Additional copies of records.* When additional copies of records are requested, an individual may be charged \$.15 per page.

(i) *Notice of anticipated fees in excess of \$25.00.* If the charge for these additional copies amounts to more than \$25.00, the requester will be notified and payment of fees may be required before the additional copies are provided, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated.

(ii) *Advance payments.* An advance payment before additional copies of the records are made will be required if:

(A) The Office estimates or determines that the total fee to be assessed under this section is likely to exceed \$250.00. When a determination is made that the allowable charges are likely to exceed \$250.00, the requester will be notified of the likely cost and will be required to provide satisfactory assurance of full payment where the requester has a history of prompt payment of Privacy Act fees, or will be required to submit an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment; or

(B) The requester has previously failed to pay a Privacy Act fee charged in a timely fashion (*i.e.*, within 30 days of the date of the billing). In such cases, the requester may be required to pay the full amount owed plus any applicable interest as provided by paragraph (a)(2)(iii) of this section, and to make an advance payment of the full amount of the estimated fee before the Office begins to process a new request.

(iii) *Interest charges.* Interest charges on an unpaid bill may be assessed starting on the 31st day following the day on which the billing was sent. Interest shall be at the rate prescribed in 31 U.S.C. 3717 and shall accrue from the date of billing. To collect unpaid bills, the Office will follow the provisions of the Debt Collection Act of 1982, as amended (96 Stat. 1749 *et seq.*) and the Debt Collection Improvement Act of 1996 (110 Stat. 1321-358 *et seq.*), including

## § 2606.207

the use of consumer reporting agencies, collection agencies, and offset.

(iv) *Remittance.* Remittance should be made by either a personal check, bank draft or a money order that is payable to the Department of the Treasury of the United States.

(b) *Fees for records filed with agencies other than OGE.* An agency shall apply its own Privacy Act fee schedule for records in OGE's executive branch Governmentwide systems that are filed directly with the agency. An agency that does not have a Privacy Act fee schedule may apply the fee schedule in this section.

### § 2606.207 Accounting of disclosures.

(a) The Office of Government Ethics or the other agency concerned will maintain an accounting of disclosures in cases where records about the data subject are disclosed from OGE's system of records except—

(1) When the disclosure is made pursuant to the Freedom of Information Act, as amended (5 U.S.C. 552); or

(2) When the disclosure is made to those officers and employees of OGE or the other agency which maintains the records who have a need for the records in the performance of their duties.

(b) This accounting of disclosures will be retained for at least five years or for the life of the record, whichever is longer, and will contain the following information:

(1) A brief description of the record disclosed;

(2) The date, nature, and purpose for the disclosure; and

(3) The name and address of the individual, agency, or other entity to whom the disclosure is made.

(c) Under sections 102 and 105 of the Ethics in Government Act, 18 U.S.C. 208(d) and 5 CFR parts 2634 and 2640 of OGE's executive branch regulations, a requester other than the data subject must submit a signed, written application on the OGE Form 201 or agency equivalent form to inspect or receive copies of certain records, such as SF 278 Public Financial Disclosure Reports, Certificates of Divestiture, 18 U.S.C. 208(b)(1) and (b)(3) waivers, and OGE certified qualified blind and diversified trust instruments and other publicly available qualified trust mate-

## 5 CFR Ch. XVI (1–16 Edition)

rials. The written application requests the name, occupation and address of the requester as well as lists the prohibitions on obtaining or using the records. These applications are used as the accounting of disclosures for these records.

(d) Except for the accounting of a disclosure made under subsection (b)(7) of the Privacy Act for a civil or criminal law enforcement activity that is authorized by law, the accounting of disclosures will be made available to the data subject upon request in accordance with the access procedures of this part.

### Subpart C—Amendment of Records

#### § 2606.301 Requests to amend records.

(a) *Amendment request.* A data subject seeking to amend a record or records that pertain to him in a system of records must submit his request in writing in accordance with the following procedures, unless this requirement is waived by the appropriate system manager. Records not subject to the Privacy Act will not be amended in accordance with these provisions.

(b) *Addresses—*(1) *Records in an OGE Governmentwide system of records.* A request to amend a record in an OGE Governmentwide system of records should be sent to the appropriate system manager as follows:

(i) *Records filed directly with OGE by non-OGE employees:* The Deputy Director, Office of Agency Programs, Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917;

(ii) *Records filed with a Designated Agency Ethics Official (DAEO) or the head of a department or agency:* The DAEO at the department or agency concerned; or

(iii) *Records filed with the Federal Election Commission by candidates for President or Vice President:* The General Counsel, Office of General Counsel, Federal Election Commission, 999 E Street, NW., Washington, DC 20463.

(2) *Records in an OGE internal system of records.* A request to amend a record in an OGE internal system of records should include the words “Privacy Act

## Office of Government Ethics

## § 2606.303

Amendment Request” on both the envelope and at the top of the request letter, and should be sent to the Deputy Director, Office of Administration and Information Management, Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917.

(c) *Contents of request.* (1) A request to amend a record in an OGE Governmentwide system of records or an OGE internal system of records should include the words “Privacy Act Amendment Request” on both the envelope and at the top of the request letter.

(2) The name of the system of records and a brief description of the record(s) proposed for amendment must be included in any request for amendment. In the event the request to amend the record(s) is the result of the data subject’s having gained access to the record(s) in accordance with the provisions concerning access to records as set in subpart B of this part, copies of previous correspondence between the requester and OGE or the agency will serve in lieu of a separate description of the record.

(3) The exact portion of the record(s) the data subject seeks to have amended should be indicated clearly. If possible, proposed alternative language should be set forth, or, at a minimum, the reasons why the data subject believes his record is not accurate, relevant, timely, or complete should be set forth with enough particularity to permit OGE or the other agency concerned not only to understand the data subject’s basis for the request, but also to make an appropriate amendment to the record.

(d) *Burden of proof.* The data subject has the burden of proof when seeking the amendment of a record. The data subject must furnish sufficient facts to persuade the appropriate system manager of the inaccuracy, irrelevance, untimeliness, or incompleteness of the record.

(e) *Identification requirement.* When the data subject’s identity has been previously verified pursuant to § 2606.203, further verification of identity is not required as long as the communication does not suggest a need for verification. If the data subject’s identity has not been previously verified, the appropriate system manager may

require identification validation as described in § 2606.203.

### § 2606.302 OGE or other agency action on requests.

(a) *Time limit for acknowledging a request for amendment.* To the extent possible, OGE or the other agency concerned will acknowledge receipt of a request to amend a record or records within 10 working days.

(b) *Initial determination on an amendment request.* The decision of OGE or the other agency in response to a request for amendment of a record in a system of records may grant in whole, or deny any part of the request to amend the record(s).

(1) If OGE or the other agency concerned grants the request, the appropriate system manager will amend the record(s) and provide a copy of the amended record(s) to the data subject. Where an accounting of disclosure has been maintained, the system manager shall advise all previous recipients of the record that an amendment has been made and give the substance of the amendment. Where practicable, the system manager shall send a copy of the amended record to previous recipients.

(2) If OGE or the other agency concerned denies the request in whole or in part, the reasons for the denial will be stated in the response letter. In addition, the response letter will state:

(i) The name and address of the official with whom an appeal of the denial may be lodged; and

(ii) A description of any other procedures which may be required of the data subject in order to process the appeal.

### § 2606.303 Request for review of an initial refusal to amend a record.

(a)(1) A data subject may submit a written appeal of the initial decision by OGE or an agency denying a request to amend a record in an OGE system of records.

(i) For records which are filed directly with OGE, the appeal must be submitted to the Director, Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917.

## § 2606.304

(ii) For records which are filed directly with an agency (including the Federal Election Commission) other than OGE, the appeal must be submitted to the Privacy Act amendments appeals official as specified in the agency's own Privacy Act regulations, or to the respective head of the agency concerned if it does not have Privacy Act regulations.

(2) The words "Privacy Act Appeal" should be included on the envelope and at the top of the letter of the appeal.

(b) The request for review should contain a brief description of the record(s) involved or copies of the correspondence from OGE or the agency in which the request to amend was denied, and the reasons why the data subject believes that the disputed information should be amended.

### **§ 2606.304 Response to a request for review of an initial refusal to amend; disagreement statements.**

(a) The OGE Director or agency reviewing official should make a final determination in writing not later than 30 days from the date the appeal was received. The 30-day period may be extended for good cause. Notice of the extension and the reasons therefor will be sent to the data subject within the 30-day period.

(b) If the OGE Director or agency reviewing official determines that the record(s) should be amended in accordance with the data subject's request, the OGE Director or agency reviewing official will take the necessary steps to advise the data subject, and to direct the appropriate system manager:

(1) To amend the record(s), and

(2) To notify previous recipients of the record(s) for which there is an accounting of disclosure that the record(s) have been amended.

(c) If the appeal decision does not grant in full the request for amendment, the decision letter will notify the data subject that he may:

(1) Obtain judicial review of the decision in accordance with the terms of the Privacy Act at 5 U.S.C. 552a(g); and

(2) File a statement setting forth his reasons for disagreeing with the decision.

(d)(1) A data subject's disagreement statement must be concise. The appro-

## 5 CFR Ch. XVI (1-1-16 Edition)

appropriate system manager has the authority to determine the "conciseness" of the statement, taking into account the scope of the disagreement and the complexity of the issues.

(2) In any disclosure of information about which an individual has filed a statement of disagreement, the appropriate system manager will clearly note any disputed portion(s) of the record(s) and will provide a copy of the statement to persons or other agencies to whom the disputed record or records has been disclosed and for whom an accounting of disclosure has been maintained. A concise statement of the reasons for not making the amendments requested may also be provided.

## **PART 2608—TESTIMONY BY OGE EMPLOYEES RELATING TO OFFICIAL INFORMATION AND PRODUCTION OF OFFICIAL RECORDS IN LEGAL PROCEEDINGS**

### **Subpart A—General Provisions**

#### **Sec.**

2608.101 Scope and purpose.

2608.102 Applicability.

2608.103 Definitions.

### **Subpart B—Requests for Testimony and Production of Documents**

2608.201 General prohibition.

2608.202 Factors OGE will consider.

2608.203 Filing requirements for demands or requests for documents or testimony.

2608.204 Service of subpoenas or requests.

2608.205 Processing demands or requests.

2608.206 Final determination.

2608.207 Restrictions that apply to testimony.

2608.208 Restrictions that apply to released records.

2608.209 Procedure when a decision is not made prior to the time a response is required.

2608.210 Procedure in the event of an adverse ruling.

### **Subpart C—Schedule of Fees**

2608.301 Fees.

### **Subpart D—Penalties**

2608.401 Penalties.

AUTHORITY: 5 U.S.C. App. (Sec. 401, Ethics in Government Act of 1978); 31 U.S.C. 9701; 44 U.S.C. 3101-3107, 3301-3303a, 3308-3314.

SOURCE: 67 FR 35710, May 21, 2002, unless otherwise noted.

### Subpart A—General Provisions

#### § 2608.101 Scope and purpose.

(a) This part sets forth policies and procedures you must follow when you submit a demand or request to an employee of the Office of Government Ethics (OGE) to produce official records and information, or provide testimony relating to official information, in connection with a legal proceeding. You must comply with these requirements when you request the release or disclosure of official records and information.

(b) The Office of Government Ethics intends these provisions to:

(1) Promote economy and efficiency in its programs and operations;

(2) Minimize the possibility of involving OGE in controversial issues not related to our functions;

(3) Maintain OGE's impartiality among private litigants where OGE is not a named party; and

(4) Protect sensitive, confidential information and the deliberative processes of OGE.

(c) In providing for these requirements, OGE does not waive the sovereign immunity of the United States.

(d) This part provides guidance for the internal operations of OGE. It does not create any right or benefit, substantive or procedural, that a party may rely upon in any legal proceeding against the United States.

#### § 2608.102 Applicability.

This part applies to demands and requests to employees for factual or expert testimony relating to official information, or for production of official records or information, in legal proceedings in which OGE is not a named party. However, it does not apply to:

(a) Demands upon or requests for an OGE employee to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of OGE;

(b) Demands upon or requests for a former OGE employee to testify as to matters in which the former employee was not directly or materially involved while at the OGE;

(c) Requests for the release of records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a; and

(d) Congressional demands and requests for testimony or records.

#### § 2608.103 Definitions.

The following definitions apply to this part:

*Demand* means a subpoena, or an order or other command of a court or other competent authority, for the production, disclosure, or release of records or for the appearance and testimony of an OGE employee that is issued in a legal proceeding.

*General Counsel* means the General Counsel of OGE or a person to whom the General Counsel has delegated authority under this part.

*Legal proceeding* means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer, or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

*OGE* means the U.S. Office of Government Ethics.

*OGE employee or employee* means:

(1)(i) Any current or former officer or employee of OGE;

(ii) Any other individual hired through contractual agreement by or on behalf of OGE or who has performed or is performing services under such an agreement for OGE; and

(iii) Any individual who served or is serving in any consulting or advisory capacity to OGE, whether formal or informal.

(2) Provided, that this definition does not include persons who are no longer employed by OGE and who are retained or hired as expert witnesses or who agree to testify about general matters, matters available to the public, or matters with which they had no specific involvement or responsibility during their employment with OGE.

*Records or official records and information* mean:

(1) All documents and materials which are OGE agency records under the Freedom of Information Act, 5 U.S.C. 552;

## § 2608.201

(2) All other documents and materials contained in OGE files; and

(3) All other information or materials acquired by an OGE employee in the performance of his or her official duties or because of his or her official status.

*Request* means any informal request, by whatever method, for the production of records and information or for testimony which has not been ordered by a court or other competent authority.

*Testimony* means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, interviews, and statements made by an individual in connection with a legal proceeding.

### Subpart B—Requests for Testimony and Production of Documents

#### § 2608.201 General prohibition.

No employee may produce official records and information or provide any testimony relating to official information in response to a demand or request without the prior, written approval of the General Counsel.

#### § 2608.202 Factors OGE will consider.

The General Counsel, in his or her sole discretion, may grant an employee permission to testify on matters relating to official information, or produce official records and information, in response to a demand or request. Among the relevant factors that the General Counsel may consider in making this decision are whether:

- (a) The purposes of this part are met;
- (b) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;
- (c) OGE has an interest in the decision that may be rendered in the legal proceeding;
- (d) Allowing such testimony or production of records would assist or hinder OGE in performing its statutory duties or use OGE resources where responding to the demand or request will interfere with the ability of OGE employees to do their work;
- (e) Allowing such testimony or production of records would be in the best interest of OGE or the United States;

## 5 CFR Ch. XVI (1–1–16 Edition)

(f) The records or testimony can be obtained from other sources;

(g) The demand or request is unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand or request arose;

(h) Disclosure would violate a statute, Executive order or regulation;

(i) Disclosure would reveal confidential, sensitive, or privileged information, trade secrets or similar, confidential commercial or financial information, otherwise protected information, or information which would otherwise be inappropriate for release;

(j) Disclosure would impede or interfere with an ongoing law enforcement investigation or proceedings, or compromise constitutional rights;

(k) Disclosure would result in OGE appearing to favor one litigant over another;

(l) Disclosure relates to documents that were produced by another agency;

(m) A substantial Government interest is implicated;

(n) The demand or request is within the authority of the party making it; and

(o) The demand or request is sufficiently specific to be answered.

#### § 2608.203 Filing requirements for demands or requests for documents or testimony.

You must comply with the following requirements whenever you issue demands or requests to an OGE employee for official records and information or testimony:

(a) Your request must be in writing and must be submitted to the General Counsel. If you serve a subpoena on OGE or an OGE employee before submitting a written request and receiving a final determination, OGE will oppose the subpoena on grounds that your request was not submitted in accordance with this subpart.

(b) Your written request must contain the following information:

(1) The caption of the legal proceeding, docket number, and name and address of the court or other authority involved;



## Office of Government Ethics

## § 2608.207

(2) A copy of the complaint or equivalent document setting forth the assertions in the case and any other pleading or document necessary to show relevance;

(3) A list of categories of records sought, a detailed description of how the information sought is relevant to the issues in the legal proceeding, and a specific description of the substance of the testimony or records sought;

(4) A statement as to how the need for the information outweighs the need to maintain any confidentiality of the information and outweighs the burden on OGE to produce the records or provide testimony;

(5) A statement indicating that the information sought is not available from another source, from other persons or entities, or from the testimony of someone other than an OGE employee, such as a retained expert;

(6) If testimony is requested, the intended use of the testimony, a general summary of the desired testimony, and a showing that no document could be provided and used in lieu of testimony;

(7) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the requested records or testimony;

(8) The name, address, and telephone number of counsel to each party in the case; and

(9) An estimate of the amount of time that the requester and other parties will require with each OGE employee for time spent by the employee to prepare for testimony, in travel, and for attendance in the legal proceeding.

(c) The Office of Government Ethics reserves the right to require additional information to complete your request where appropriate.

(d) Your request should be submitted at least 45 days before the date that records or testimony is required. Requests submitted in less than 45 days before records or testimony is required must be accompanied by a written explanation stating the reasons for the late request and the reasons for expedited processing.

(e) Failure to cooperate in good faith to enable the General Counsel to make an informed decision may serve as the basis for a determination not to comply with your request.

### § 2608.204 Service of subpoenas or requests.

Subpoenas or requests for official records or information or testimony must be served on the General Counsel, Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917.

### § 2608.205 Processing demands or requests.

(a) After service of a demand or request to testify, the General Counsel will review the demand or request and, in accordance with the provisions of this subpart, determine whether, or under what conditions, to authorize the employee to testify on matters relating to official information and/or produce official records and information.

(b) The Office of Government Ethics will process requests in the order in which they are received. Absent exigent or unusual circumstances, OGE will respond within 45 days from the date that we receive it. The time for response will depend upon the scope of the request.

(c) The General Counsel may grant a waiver of any procedure described by this subpart where a waiver is considered necessary to promote a significant interest of OGE or the United States or for other good cause.

### § 2608.206 Final determination.

The General Counsel makes the final determination on demands and requests to employees for production of official records and information or testimony. All final determinations are within the sole discretion of the General Counsel. The General Counsel will notify the requester and the court or other authority of the final determination, the reasons for the grant or denial of the demand or request, and any conditions that the General Counsel may impose on the release of records or information, or on the testimony of an OGE employee.

### § 2608.207 Restrictions that apply to testimony.

(a) The General Counsel may impose conditions or restrictions on the testimony of OGE employees including, for

## § 2608.208

example, limiting the areas of testimony or requiring the requester and other parties to the legal proceeding to agree that the transcript of the testimony will be kept under seal or will only be used or made available in the particular legal proceeding for which testimony was requested. The General Counsel may also require a copy of the transcript of testimony at the requester's expense.

(b) The Office of Government Ethics may offer the employee's written declaration in lieu of testimony.

(c) If authorized to testify pursuant to this part, an employee may testify as to facts within his or her personal knowledge, but, unless specifically authorized to do so by the General Counsel, the employee shall not:

(1) Disclose confidential or privileged information; or

(2) For a current OGE employee, testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of OGE unless testimony is being given on behalf of the United States (see also § 2635.805 of this chapter).

### § 2608.208 Restrictions that apply to released records.

(a) The General Counsel may impose conditions or restrictions on the release of official records and information, including the requirement that parties to the proceeding obtain a protective order or execute a confidentiality agreement to limit access and any further disclosure. The terms of the protective order or of a confidentiality agreement must be acceptable to the General Counsel. In cases where protective orders or confidentiality agreements have already been executed, OGE may condition the release of official records and information on an amendment to the existing protective order or confidentiality agreement.

(b) If the General Counsel so determines, original OGE records may be presented for examination in response to a demand or request, but they are not to be presented as evidence or otherwise used in a manner by which they could lose their identity as official OGE records, nor are they to be

## 5 CFR Ch. XVI (1–1–16 Edition)

marked or altered. In lieu of the original records, certified copies will be presented for evidentiary purposes (see 28 U.S.C. 1733).

### § 2608.209 Procedure when a decision is not made prior to the time a response is required.

If a response to a demand or request is required before the General Counsel can make the determination referred to in § 2608.201, the General Counsel, when necessary, will provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the demand or request is being reviewed, and seek a stay of the demand or request pending a final determination.

### § 2608.210 Procedure in the event of an adverse ruling.

If the court or other competent authority fails to stay the demand or request, the employee upon whom the demand or request is made, unless otherwise advised by the General Counsel, will appear at the stated time and place, produce a copy of this part, state that the employee has been advised by counsel not to provide the requested testimony or produce documents, and respectfully decline to comply with the demand or request, citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). A written response may be offered to a request, or to a demand, if permitted by the court or other competent authority.

## Subpart C—Schedule of Fees

### § 2608.301 Fees.

(a) *Generally.* The General Counsel may condition the production of records or appearance for testimony upon advance payment of a reasonable estimate of the costs to OGE.

(b) *Fees for records.* Fees for producing records will include fees for searching, reviewing, and duplicating records, costs of attorney time spent in reviewing the demand or request, and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. Costs for employee time will be calculated on the basis of the hourly pay

## Office of Government Ethics

## Pt. 2610

of the employee (including all pay, allowance, and benefits). Fees for duplication will be the same as those charged by OGE in its Freedom of Information Act and Ethics in Government Act fee regulations at 5 CFR part 2604, subparts E and G.

(c) *Witness fees.* Fees for attendance by a witness will include fees, expenses, and allowances prescribed by the court's rules. If no such fees are prescribed, witness fees will be determined based upon the rule of the Federal district court closest to the location where the witness will appear. Such fees will include cost of time spent by the witness to prepare for testimony, in travel, and for attendance in the legal proceeding.

(d) *Payment of fees.* You must pay witness fees for current OGE employees and any records certification fees by submitting to the General Counsel a check or money order for the appropriate amount made payable to the Treasury of the United States. In the case of testimony by former OGE employees, you must pay applicable fees directly to the former employee in accordance with 28 U.S.C. 1821 or other applicable statutes.

(e) *Certification (authentication) of copies of records.* The Office of Government Ethics may certify that records are true copies in order to facilitate their use as evidence. If you seek certification, you must request certified copies from OGE at least 45 days before the date they will be needed. The request should be sent to the General Counsel. You will be charged a certification fee of \$15.00 for each document certified.

(f) *Waiver or reduction of fees.* The General Counsel, in his or her sole discretion, may, upon a showing of reasonable cause, waive or reduce any fees in connection with the testimony, production, or certification of records.

(g) *De minimis fees.* Fees will not be assessed if the total charge would be \$10.00 or less.

### Subpart D—Penalties

#### § 2608.401 Penalties.

(a) An employee who discloses official records or information or gives testimony relating to official informa-

tion, except as expressly authorized by OGE or as ordered by a Federal court after OGE has had the opportunity to be heard, may face the penalties provided in 18 U.S.C. 641 and other applicable laws. Additionally, former OGE employees are subject to the restrictions and penalties of 18 U.S.C. 207 and 216.

(b) A current OGE employee who testifies or produces official records and information in violation of this part shall be subject to disciplinary action.

## PART 2610—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT

### Subpart A—General Provisions

#### Sec.

- 2610.101 Definitions.
- 2610.102 Purpose.
- 2610.103 When the Act applies.
- 2610.104 Proceedings covered.
- 2610.105 Eligibility of applicants.
- 2610.106 Standards for awards.
- 2610.107 Allowable fees and expenses.
- 2610.108 Rulemaking on maximum rate for attorney and agent fees.
- 2610.109 Awards against other agencies.

### Subpart B—Information Required From Applicants

- 2610.201 Contents of application.
- 2610.202 Net worth exhibit.
- 2610.203 Documentation of fees and expenses.
- 2610.204 When an application may be filed.

### Subpart C—Procedures for Considering Applications

- 2610.301 Jurisdiction of adjudicative officer.
- 2610.302 Filing and service of documents.
- 2610.303 Answer to application.
- 2610.304 Reply.
- 2610.305 Comments by other parties.
- 2610.306 Settlement.
- 2610.307 Further proceedings.
- 2610.308 Decision.
- 2610.309 Agency review.
- 2610.310 Judicial review.
- 2610.311 Payment of award.

AUTHORITY: 5 U.S.C. 504(c)(1); 5 U.S.C. App. (Ethics in Government Act of 1978).

SOURCE: 57 FR 33268, July 28, 1992, unless otherwise noted.

**Subpart A—General Provisions**

**§ 2610.101 Definitions.**

(a) *Act* means the Equal Access to Justice Act, 5 U.S.C. 504, as amended.

(b) *Adjudicative officer* means the official, without regard to whether the official is designated as a hearing examiner, administrative law judge, administrative judge, or otherwise, who presided at the adversary adjudication.

(c) *Adversary adjudication* means:

(1) An adjudication under 5 U.S.C. 554 in which the position of the United States is represented by counsel or otherwise, but not including an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license; and

(2) An appeal of a decision of a contracting officer made pursuant to section 6 of the Contracts Disputes Act of 1978 (41 U.S.C. 605) as provided in section 8 of that statute (41 U.S.C. 607).

(d) *Agency counsel* means:

(1) When the position of the Office is being represented, the attorney or attorneys designated by the Office's General Counsel to represent the Office in a proceeding covered by this part; and

(2) When the position of another agency of the United States is being represented, the representative or representatives as designated by that agency.

(e) *Office* means the United States Office of Government Ethics, or the organizational unit within the Office responsible for conducting an adversary adjudication subject to this part.

(f) *Proceeding* means an adversary adjudication as defined above.

(g) *Director* means the Director of the United States Office of Government Ethics.

**§ 2610.102 Purpose.**

The Act provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings ("adversary adjudications") before the Office of Government Ethics. An eligible party may receive an award when it prevails over the Office, unless the Office's position in the proceeding was substantially justified or special circumstances make an award unjust. An eligible party may also re-

ceive an award when the demand of the Office is substantially in excess of the decision in the adversary adjudication and is unreasonable when compared with such decision, under the facts and circumstances of the case, unless the party has committed a willful violation of law or otherwise acted in bad faith or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that the Office will use to make them.

[57 FR 33268, July 28, 1992, as amended at 63 FR 13116, Mar. 18, 1998]

**§ 2610.103 When the Act applies.**

The Act applies to any adversary adjudication pending or commenced before the Office of Government Ethics on or after October 1, 1989, which is the date the Office became a separate executive agency. Prior to October 1, 1989, the Office was part of the Office of Personnel Management. Any adversary adjudication pending or commenced before October 1, 1989, and not finally disposed of by that date, is governed by the rules and policies implementing the Equal Access to Justice Act as adopted by the Office of Personnel Management.

**§ 2610.104 Proceedings covered.**

(a) This part applies to adversary administrative adjudications conducted by the Office of Government Ethics. When all other conditions in the Act and in these rules are met, the types of proceedings to which this part applies are adversary administrative adjudications conducted by the Office under:

(1) The Debt Collection Act of 1982, 5 U.S.C. 5514;

(2) The Contract Disputes Act of 1978, 41 U.S.C. 605, 607;

(3) The Ethics in Government Act of 1978, section 402(f)(2), 5 U.S.C. app., and subpart E of part 2638 of this chapter.

(b) The Office's failure to identify a type of proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the proceeding is covered

will then be an issue for resolution in the proceedings on the application.

(c) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered matters.

#### § 2610.105 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award. The term “party” is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart and in subpart B of this part.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than \$2,000,000;

(2) The sole owner of an unincorporated business who has a net worth of not more than \$7,000,000, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3), with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act, 12 U.S.C. 1141j(a), with not more than 500 employees;

(5) Any other partnership, corporation, association, unit of local government, or organization with a net worth of not more than \$7,000,000 and not more than 500 employees; and

(6) For purposes of § 2610.106(b), a small entity as defined in 5 U.S.C. 601.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the underlying proceeding was initiated. For appeals of decisions of contracting officers made pursuant to section 6 of the Contracts Disputes Act of 1978, the net worth and number of employees of an applicant shall be determined as of the date the applicant filed its appeal under 41 U.S.C. 606.

(d) An applicant who owns an unincorporated business will be considered as an “individual” rather than a “sole owner of an unincorporated business”

if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant’s direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. An individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interests of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

[57 FR 33268, July 28, 1992, as amended at 63 FR 13116, Mar. 18, 1998]

#### § 2610.106 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding or in a significant and discrete substantive portion of the proceeding, unless the position of the Office was substantially justified. The position of the Office includes, in addition to the position taken by the Office in the adversary adjudication, the action or failure to act by the Office upon which the adversary adjudication is based. The burden of proof that an award should not be made to an eligible prevailing applicant because the Office’s position was

substantially justified is on the Office. No presumption arises that the Office's position was not substantially justified simply because the Office did not prevail.

(b) If, in a proceeding arising from an Office action to enforce an applicant's compliance with a statutory or regulatory requirement, the demand of the Office is substantially in excess of the decision in the proceeding and is unreasonable when compared with that decision under the facts and circumstances of the case, the applicant shall be awarded the fees and other expenses related to defending against the excessive demand, unless the applicant has committed a willful violation of law or otherwise acted in bad faith or special circumstances make an award unjust. The burden of proof that the demand of the Office is substantially in excess of the decision and is unreasonable when compared with such decision is on the applicant. As used in this paragraph, "demand" means the express demand of the Office which led to the adversary adjudication, but it does not include a recitation by the Office of the maximum statutory penalty in the administrative complaint, or elsewhere when accompanied by an express demand for a lesser amount. Fees and expenses awarded under this paragraph shall be paid only as a consequence of appropriations provided in advance.

(c) Awards for fees and expenses incurred before the date on which a proceeding was initiated will be made only if the applicant can demonstrate that they were reasonably incurred in preparation for the proceeding.

(d) An award under this part will be reduced or denied if the Office's position was substantially justified in law and fact, if the applicant has unduly or unreasonably protracted the proceeding, if the applicant has falsified the application (including documentation) or net worth exhibit, or if special circumstances make the award unjust.

[57 FR 33268, July 28, 1992, as amended at 60 FR 38666, July 28, 1995; 63 FR 13116, Mar. 18, 1998]

**§ 2610.107 Allowable fees and expenses.**

(a) Awards will be based on rates customarily charged by persons engaged

in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at reduced rate to the applicant.

(b) Except as provided in § 2610.108, no award for the fee of an attorney or agent under these rules may exceed \$125.00 per hour. No award to compensate an expert witness may exceed the highest rate at which the Office pays expert witnesses. However, an award may also include the reasonable expenses of the attorney, agency, or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the adjudicative officer shall consider the following:

(1) If the attorney, agent or witness is in private practice, his or her customary fees for similar services, or, if an employee of the applicant, the fully allocated costs of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the services does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of applicant's case.

[57 FR 33268, July 28, 1992, as amended at 63 FR 13116, Mar. 18, 1998]

**§ 2610.108 Rulemaking on maximum rate for attorney and agent fees.**

(a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys or agents qualified to handle certain types of proceedings), the Office may adopt regulations providing that attorney or agent fees may

be awarded at a rate higher than \$125.00 per hour in some or all of the types of proceedings covered by this part. The Office will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. 553.

(b) Any person may file with the Office a petition for rulemaking to increase the maximum rate for attorney or agent fees as provided in 5 U.S.C. 504(b)(1)(A)(ii). The petition should identify the rate the petitioner believes the Office should establish and the types of proceedings in which the rate should be used. It should also explain fully the reasons why the higher rate is warranted. The Office will respond to the petition within 60 days after it is filed, by initiating a rulemaking proceeding, denying the petition, or taking other appropriate action.

[57 FR 33268, July 28, 1992, as amended at 63 FR 13116, Mar. 18, 1998]

#### **§ 2610.109 Awards against other agencies.**

If an applicant is entitled to an award because it prevails over another agency of the United States that participates in a proceeding before the Office of Government Ethics and takes a position that is not substantially justified, the award or an appropriate portion of the award shall be made against that agency.

### **Subpart B—Information Required From Applicants**

#### **§ 2610.201 Contents of application.**

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. Unless the applicant is an individual, the application shall further state the number of employees of the applicant and describe briefly the type and purpose of its organization or business. The application shall also:

(1) Show that the applicant has prevailed and identify the position of the Office in the proceeding that the applicant alleges was not substantially justified; or

(2) Show that the demand by the Office in the proceeding was substantially in excess of, and was unreasonable when compared with, the decision in the proceeding.

(b) The application shall also include, for purposes of § 2610.106 (a) or (b), a statement that the applicant's net worth does not exceed \$2,000,000 (for individuals) or \$7,000,000 (for all other applicants, including their affiliates) or alternatively, for purposes of § 2610.106(b) only, a declaration that the applicant is a small entity as defined in 5 U.S.C. 601. However, an applicant may omit the statement concerning its net worth if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application shall state the amount of fees and expenses for which an award is sought.

(d) The application may also include any other matters that the applicant wishes the Office to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification made by the applicant or authorized officer or attorney of the applicant under oath or under penalty of perjury that the information provided in the application is true and correct.

(f) These collections of information are not subject to Office of Management and Budget review under the Paperwork Reduction Act (44 U.S.C. chapter 35) because they are expected to involve nine or fewer persons each year.

[57 FR 33268, July 28, 1992, as amended at 59 FR 34755, July 7, 1994; 63 FR 13116, Mar. 18, 1998]

## **§ 2610.202**

### **§ 2610.202 Net worth exhibit.**

(a) Each applicant, except a qualified tax-exempt organization or cooperative association, must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 2610.105(f)) when the underlying adversary adjudication was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the adjudicative officer in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1)–(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on counsel representing the Office, but need not be served on any other party to the proceeding, if any. If the adjudicative officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request by another party or the public to inspect or copy the exhibit shall be resolved in accordance with the Office of Government Ethics' established procedures under the Freedom of Information Act.

## **5 CFR Ch. XVI (1–1–16 Edition)**

### **§ 2610.203 Documentation of fees and expenses.**

The application shall be accompanied by full and itemized documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rates at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The adjudicative officer may require the applicant to provide vouchers, receipts, logs, or other documentation for any fees or expenses claimed, pursuant to § 2610.306.

### **§ 2610.204 When an application may be filed.**

(a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding. An application may also be filed when the demand of the Office is substantially in excess of the decision in the proceeding and is unreasonable when compared with such decision. In no case may an application be filed later than 30 days after the Office of Government Ethics' final disposition of the proceeding.

(b) For purposes of this rule, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, becomes final and unappealable, both within the Office and to the courts.

(c) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed or has been subjected to a demand from the Office substantially in excess of the decision in the adversary adjudication and unreasonable when compared to that decision, proceedings for the award of fees shall be stayed



pending final disposition of the underlying controversy. When the United States appeals the underlying merits of an adversary adjudication to a court, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

[57 FR 33268, July 28, 1992, as amended at 63 FR 13116, Mar. 18, 1998]

### **Subpart C—Procedures for Considering Applications**

#### **§ 2610.301 Jurisdiction of adjudicative officer.**

Any provision in the Office's rules and regulations other than this part which limits or terminates the jurisdiction of an adjudicative officer upon the effective date of his or her decision in the underlying proceeding shall not in any way affect his or her jurisdiction to render a decision under this part.

#### **§ 2610.302 Filing and service of documents.**

Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding, except as provided in § 2610.202(b) for confidential financial information.

#### **§ 2610.303 Answer to application.**

(a) Within 30 days after service of an application, counsel representing the Office may file an answer to the application. Agency counsel may request an extension of time for filing. If agency counsel fails to answer or otherwise fails to contest or settle the application within the 30-day period, the adjudicative officer, upon a satisfactory showing of entitlement by the applicant, may make an award for the applicant's fees and other expenses under the Act.

(b) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may

jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted for good cause by the adjudicative officer upon request by agency counsel and the applicant.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of agency counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer either supporting affidavits or a request for further proceedings under § 2610.307.

#### **§ 2610.304 Reply.**

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 2610.307.

#### **§ 2610.305 Comments by other parties.**

Any party to a proceeding other than the applicant and agency counsel may file comments on an application within 30 days after it is served, or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

#### **§ 2610.306 Settlement.**

The applicant and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded, in accordance with the settlement procedure applicable to the underlying procedure. If an eligible prevailing party and agency counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

## **§ 2610.307**

## **5 CFR Ch. XVI (1–1–16 Edition)**

### **§ 2610.307 Further proceedings.**

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel, or on his or her own initiative, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written submissions or, as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses), pertinent discovery or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible. Whether or not the position of the Office was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(b) A request that the adjudicative officer order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

### **§ 2610.308 Decision.**

The adjudicative officer shall issue an initial decision on the application within 30 days after completion of proceedings on the application. The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the Office's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. If the applicant has sought an award against more than one agency, the decision shall allocate responsibility for

payment of any award made among the agencies, and shall explain the reasons for the allocation made.

### **§ 2610.309 Agency review.**

Within 30 days after issuance of an initial decision under this part, either the applicant or agency counsel may seek review of the initial decision on the fee application, or the Director (or his or her designee) may decide to review the initial decision on his or her own initiative, in accordance with the Office's review or appeal procedures applicable to the underlying proceeding. If neither the applicant nor agency counsel seeks review and the Director (or designee) does not take review on his or her own initiative, the initial decision on the application shall become a final decision of the Office of Government Ethics 30 days after it is issued. Whether to review a decision is a matter within the discretion of the Director (or his or her designee, if any). If review is taken, the Office will issue a final decision on the application or remand the application to the adjudicative officer for further proceedings.

### **§ 2610.310 Judicial review.**

Judicial review of final agency decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

### **§ 2610.311 Payment of award.**

An applicant seeking payment of an award shall submit a copy of the Office's final decision granting the award, accompanied by a certification that the applicant will not seek review of the decision in the United States courts, to the Associate Director for Administration, Office of Government Ethics, Suite 500, 1201 New York Avenue NW., Washington, DC 20005–3917. The Office will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant, the Office, or any other party to the proceedings.

## SUBCHAPTER B—GOVERNMENT ETHICS

### PART 2634—EXECUTIVE BRANCH FINANCIAL DISCLOSURE, QUALI- FIED TRUSTS, AND CERTIFICATES OF DIVESTITURE

#### Subpart A—General Provisions

- Sec.  
2634.101 Authority.  
2634.102 Purpose and overview.  
2634.103 Executive agency supplemental reg-  
ulations.  
2634.104 Policies.  
2634.105 Definitions.

#### Subpart B—Persons Required to File Public Financial Disclosure Reports

- 2634.201 General requirements, filing dates,  
and extensions.  
2634.202 Public filer defined.  
2634.203 Persons excluded by rule.  
2634.204 Employment of sixty days or less.  
2634.205 Special waiver of public reporting  
requirements.

#### Subpart C—Contents of Public Reports

- 2634.301 Interests in property.  
2634.302 Income.  
2634.303 Purchases, sales, and exchanges.  
2634.304 Gifts and reimbursements.  
2634.305 Liabilities.  
2634.306 Agreements and arrangements.  
2634.307 Outside positions.  
2634.308 Reporting periods and contents of  
public financial disclosure reports.  
2634.309 Spouses and dependent children.  
2634.310 Trusts, estates, and investment  
funds.  
2634.311 Special rules.

#### Subpart D—Qualified Trusts

- 2634.401 Overview.  
2634.402 Definitions.  
2634.403 General description of trusts.  
2634.404 Summary of procedures for creation  
of a qualified trust.  
2634.405 Standards for becoming an inde-  
pendent trustee or other fiduciary.  
2634.406 Initial portfolio.  
2634.407 Certification of qualified trust by  
the Office of Government Ethics.  
2634.408 Administration of a qualified trust.  
2634.409 Pre-existing trusts.  
2634.410 Dissolution.  
2634.411 Reporting on financial disclosure  
reports.  
2634.412 Sanctions and enforcement.  
2634.413 Public access.  
2634.414 OMB control number.

#### Subpart E—Revocation of Trust Certificates and Trustee Approvals

- 2634.501 Purpose and scope.  
2634.502 Definitions.  
2634.503 Determinations.

#### Subpart F—Procedure

- 2634.601 Report forms.  
2634.602 Filing of reports.  
2634.603 Custody of and access to public re-  
ports.  
2634.604 Custody of and denial of public ac-  
cess to confidential reports.  
2634.605 Review of reports.  
2634.606 Updated disclosure of advice-and-  
consent nominees.  
2634.607 Advice and opinions.

#### Subpart G—Penalties

- 2634.701 Failure to file or falsifying reports.  
2634.702 Breaches by trust fiduciaries and  
interested parties.  
2634.703 Misuse of public reports.  
2634.704 Late filing fee.

#### Subpart H—Ethics Agreements

- 2634.801 Scope.  
2634.802 Requirements.  
2634.803 Notification of ethics agreements.  
2634.804 Evidence of compliance.  
2634.805 Retention.

#### Subpart I—Confidential Financial Disclosure Reports

- 2634.901 Policies of confidential financial  
disclosure reporting.  
2634.902 [Reserved]  
2634.903 General requirements, filing dates,  
and extensions.  
2634.904 Confidential filer defined.  
2634.905 Use of alternative procedures.  
2634.906 Review of confidential filer status.  
2634.907 Report contents.  
2634.908 Reporting periods.  
2634.909 Procedures, penalties, and ethics  
agreements.

#### Subpart J—Certificates of Divestiture

- 2634.1001 Overview.  
2634.1002 Role of the Internal Revenue Serv-  
ice.  
2634.1003 Definitions.  
2634.1004 General rule.  
2634.1005 How to obtain a Certificate of Di-  
vestiture.  
2634.1006 Rollover into permitted property.  
2634.1007 Cases in which Certificates of Di-  
vestiture will not be issued.

## § 2634.101

2634.1008 Public access to a Certificate of Divestiture.

APPENDIX A TO PART 2634—CERTIFICATE OF INDEPENDENCE (FORM APPROVED: OMB CONTROL No. 3209-0007)

APPENDIX B TO PART 2634—CERTIFICATE OF COMPLIANCE (FORM APPROVED: OMB CONTROL No. 3209-0007)

APPENDIX C TO PART 2634—PRIVACY ACT AND PAPERWORK REDUCTION ACT NOTICES FOR APPENDIXES A AND B

AUTHORITY: 5 U.S.C. App. (Ethics in Government Act of 1978); 26 U.S.C. 1043; Pub. L. 101-410, 104 Stat. 890, 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990), as amended by Sec. 31001, Pub. L. 104-134, 110 Stat. 1321 (Debt Collection Improvement Act of 1996); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

### Subpart A—General Provisions

SOURCE: 57 FR 11804, Apr. 7, 1992, unless otherwise noted.

#### § 2634.101 Authority.

The regulation in this part is issued pursuant to the authority of the Ethics in Government Act of 1978, as amended; 26 U.S.C. 1043; the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996; and Executive Order 12674 of April 12, 1989, as modified by Executive Order 12731 of October 17, 1990.

[64 FR 47096, Aug. 30, 1999]

#### § 2634.102 Purpose and overview.

(a) This regulation supplements and implements title I of the Act and section 201(d) of Executive Order 12674 (as modified by Executive Order 12731) with respect to executive branch employees, by setting forth more specifically the uniform procedures and requirements for financial disclosure and for the certification and use of qualified blind and diversified trusts. Additionally, this regulation implements section 502 of the Reform Act by establishing procedures for executive branch personnel to obtain Certificates of Divestiture, which permit deferred recognition of capital gain in certain instances.

(b) The rules in this part govern both public and confidential (nonpublic) fi-

## 5 CFR Ch. XVI (1-1-16 Edition)

nancial disclosure systems. Subpart I of this part contains the rules applicable to the confidential disclosure system.

[57 FR 11804, Apr. 7, 1992, as amended at 71 FR 28233, May 16, 2006]

#### § 2634.103 Executive agency supplemental regulations.

(a) This regulation is intended to provide uniformity for executive branch financial disclosure systems. However, an agency may, subject to the prior written approval of the Office of Government Ethics, issue supplemental regulations implementing this part, if necessary to address special or unique agency circumstances. Such regulations:

(1) Shall be consistent with the Act, Executive Orders 12674 and 12731, and this part; and

(2) Shall impose no additional reporting requirements on either public or confidential filers, unless specifically authorized by the Office of Government Ethics as supplemental confidential reporting.

NOTE: Supplemental regulations will not be used to satisfy the separate requirement of 5 U.S.C. App. (Ethics in Government Act of 1978, Section 402(d)(1)) that each agency have established written procedures on how to collect, review, evaluate, and, where appropriate, make publicly available, financial disclosure statements filed with it.

(b) Requests for approval of supplemental regulations under paragraph (a) of this section shall be submitted in writing to the Office of Government Ethics, and shall set forth the agency's need for any proposed supplemental reporting requirements. See § 2634.901 (b) and (c).

(c) Agencies should review all of their existing financial disclosure regulations to determine which of those regulations must be modified or revoked in order to conform with the requirements of this part. Any amendatory agency regulations shall be processed in accordance with paragraphs (a) and (b) of this section.

#### § 2634.104 Policies.

(a) Title I of the Act requires that high-level Federal officials disclose

## Office of Government Ethics

## § 2634.105

publicly their personal financial interests, to ensure confidence in the integrity of the Federal Government by demonstrating that they are able to carry out their duties without compromising the public trust. Title I also authorizes the Office of Government Ethics to establish a confidential (non-public) financial disclosure system for less senior executive branch personnel in certain designated positions, to facilitate internal agency conflict-of-interest review.

(b) Public and confidential financial disclosure serves to prevent conflicts of interest and to identify potential conflicts, by providing for a systematic review of the financial interests of both current and prospective officers and employees. These reports assist agencies in administering their ethics programs and providing counseling to employees.

(c) Financial disclosure reports are not net worth statements. Financial disclosure systems seek only the information that the President, Congress, or OGE as the supervising ethics office for the executive branch has deemed relevant to the administration and application of the criminal conflict of interest laws, other statutes on ethical conduct or financial interests, and Executive orders or regulations on standards of ethical conduct.

(d) Nothing in the Act or this part requiring reporting of information or the filing of any report shall be deemed to authorize receipt of income, honoraria, gifts, or reimbursements; holding of assets, liabilities, or positions; or involvement in transactions that are prohibited by law, Executive order or regulation.

(e) The provisions of title I of the Act and this part requiring the reporting of information shall supersede any general requirement under any other provision of law or regulation on the reporting of information required for purposes of preventing conflicts of interest or apparent conflicts of interest. However, the provisions of title I and this part shall not supersede the requirements of 5 U.S.C. 7342 (the Foreign Gifts and Decorations Act).

(f) This regulation is intended to be gender-neutral; therefore, use of the

terms he, his, and him include she, hers, and her, and vice versa.

### § 2634.105 Definitions.

For purposes of this part:

(a) *Act* means the Ethics in Government Act of 1978 (Pub. L. 95-521, as amended), as modified by the Ethics Reform Act of 1989 (Pub. L. 101-194, as amended).

(b) *Agency* means any executive agency as defined in 5 U.S.C. 105 (any executive department, Government corporation, or independent establishment in the executive branch), any military department as defined in 5 U.S.C. 102, and the Postal Service and the Postal Rate Commission. It does not include the General Accounting Office.

(c) *Confidential filer*. For the definition of “confidential filer,” see § 2634.904.

(d) *Dependent child* means, when used with respect to any reporting individual, any individual who is a son, daughter, stepson, or stepdaughter and who:

(1) Is unmarried, under age 21, and living in the household of the reporting individual; or

(2) Is a dependent of the reporting individual within the meaning of section 152 of the Internal Revenue Code of 1986, 26 U.S.C. 152.

(e) *Designated agency ethics official* means the primary officer or employee who is designated by the head of an agency to administer the provisions of title I of the Act and this part within an agency, and in his absence the alternate who is designated by the head of the agency. The term also includes a delegate of such an official, unless otherwise indicated. See subpart B of part 2638 of this chapter on the appointment and additional responsibilities of a designated agency ethics official and alternate.

(f) *Executive branch* means any agency as defined in paragraph (b) of this section and any other entity or administrative unit in the executive branch.

(g) *Filer* is used interchangeably with “reporting individual,” and may refer to a “confidential filer” as defined in paragraph (c) of this section, a “public filer” as defined in paragraph (m) of this section, or a nominee or candidate as described in § 2634.201.

**§ 2634.105**

(h) *Gift* means a payment, advance, forbearance, rendering, or deposit of money, or anything of value, unless consideration of equal or greater value is received by the donor, but does not include:

(1) Bequests and other forms of inheritance;

(2) Suitable mementos of a function honoring the reporting individual;

(3) Food, lodging, transportation, and entertainment provided by a foreign government within a foreign country or by the United States Government, the District of Columbia, or a State or local government or political subdivision thereof;

(4) Food and beverages which are not consumed in connection with a gift of overnight lodging;

(5) Communications to the offices of a reporting individual, including subscriptions to newspapers and periodicals;

(6) Consumable products provided by home-State businesses to the offices of the President or Vice President, if those products are intended for consumption by persons other than the President or Vice President; or

(7) Exclusions and exceptions as described at § 2634.304(c) and (d).

(i) *Honorarium* means a payment of money or anything of value for an appearance, speech, or article.

(j) *Income* means all income from whatever source derived. It includes but is not limited to the following items: earned income such as compensation for services, fees, commissions, salaries, wages and similar items; gross income derived from business (and net income if the individual elects to include it); gains derived from dealings in property including capital gains; interest; rents; royalties; dividends; annuities; income from the investment portion of life insurance and endowment contracts; pensions; income from discharge of indebtedness; distributive share of partnership income; and income from an interest in an estate or trust. The term includes all income items, regardless of whether they are taxable for Federal income tax purposes, such as interest on municipal bonds. Generally, income means "gross income" as determined in conformity with the Internal Rev-

**5 CFR Ch. XVI (1-1-16 Edition)**

enue Service principles at 26 CFR 1.61-1 through 1.61-15 and 1.61-21.

(k) *Personal hospitality of any individual* means hospitality extended for a nonbusiness purpose by an individual, not a corporation or organization, at the personal residence of or on property or facilities owned by that individual or his family.

(l) *Personal residence* means any real property used exclusively as a private dwelling by the reporting individual or his spouse, which is not rented out during any portion of the reporting period. The term is not limited to one's domicile; there may be more than one personal residence, including a vacation home.

(m) *Public filer*. For the definition of "public filer," see § 2634.202.

(n) *Reimbursement* means any payment or other thing of value received by the reporting individual (other than gifts, as defined in paragraph (h) of this section) to cover travel-related expenses of such individual, other than those which are:

(1) Provided by the United States Government, the District of Columbia, or a State or local government or political subdivision thereof;

(2) Required to be reported by the reporting individual under 5 U.S.C. 7342 (the Foreign Gifts and Decorations Act); or

(3) Required to be reported under section 304 of the Federal Election Campaign Act of 1971 (2 U.S.C. 434) (relating to reports of campaign contributions).

NOTE: Payments which are not made to the individual are not reimbursements for purposes of this part. Thus, payments made to the filer's employing agency to cover official travel-related expenses do not fit this definition of reimbursement. For example, payments being accepted by the agency pursuant to statutory authority such as 31 U.S.C. 1353, as implemented by 41 CFR part 304-1, are not considered reimbursements under this part 2634, because they are not payments received by the reporting individual. On the other hand, travel payments made to the employee by an outside entity for private travel are considered reimbursements for purposes of this part. Likewise, travel payments received from certain nonprofit entities under

## Office of Government Ethics

## § 2634.201

authority of 5 U.S.C. 4111 are considered reimbursements, even though for official travel, since that statute specifies that such payments must be made to the individual directly (with prior approval from the individual's agency).

(o) *Relative* means an individual who is related to the reporting individual, as father, mother, son, daughter, brother, sister, uncle, aunt, great uncle, great aunt, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, half sister, or who is the grandfather or grandmother of the spouse of the reporting individual, and shall be deemed to include the fiance or fiancée of the reporting individual.

(p) *Reporting individual* is used interchangeably with "filer," and may refer to a "confidential filer" as defined in § 2634.904, a "public filer" as defined in § 2634.202, or a nominee or candidate as described in § 2634.201.

(q) *Reviewing official* means the designated agency ethics official or his delegate, the Secretary concerned, the head of the agency, or the Director of the Office of Government Ethics.

(r) *Secretary concerned* has the meaning set forth in 10 U.S.C. 101(8) (relating to the Secretaries of the Army, Navy, Air Force, and for certain Coast Guard matters, the Secretary of Transportation); and, in addition, means:

(1) The Secretary of Commerce, in matters concerning the National Oceanic and Atmospheric Administration;

(2) The Secretary of Health and Human Services, with respect to matters concerning the Public Health Service; and

(3) The Secretary of State with respect to matters concerning the Foreign Service.

(s) *Special Government employee* has the meaning given to that term by the first sentence of 18 U.S.C. 202(a): an officer or employee of an agency who is retained, designated, appointed, or employed to perform temporary duties, with or without compensation, for not to exceed 130 days during any period of

365 consecutive days, either on a full-time or intermittent basis.

(t) *Value* means a good faith estimate of the fair market value if the exact value is neither known nor easily obtainable by the reporting individual without undue hardship or expense. In the case of any interest in property, see the alternative valuation options in § 2634.301(e). For gifts and reimbursements, see § 2634.304(e).

[57 FR 11804, Apr. 7, 1992; 57 FR 21854, May 22, 1992; 62 FR 48747, Sept. 17, 1997; 63 FR 69992, Dec. 18, 1998]

### Subpart B—Persons Required To File Public Financial Disclosure Reports

SOURCE: 57 FR 11806, Apr. 7, 1992, unless otherwise noted.

#### § 2634.201 General requirements, filing dates, and extensions.

(a) *Incumbents*. A public filer as defined in § 2634.202 of this subpart who, during any calendar year, performs the duties of his position or office, as described in that section, for a period in excess of 60 days shall file a public financial disclosure report containing the information prescribed in subpart C of this part, on or before May 15 of the succeeding year.

*Example 1.* An SES official commences performing the duties of his position on November 15. He will not be required to file an incumbent report for that calendar year.

*Example 2.* An employee, who is classified at GS-15, is assigned to fill an SES position in an acting capacity, from October 15 through December 31. Having performed the duties of a covered position for more than 60 days during the calendar year, he will be required to file an incumbent report. In addition, he must file a new entrant report the first time he serves more than 60 days in a calendar year in the position, in accordance with § 2634.201(b) and § 2634.204(c)(1).

(b) *New entrants*. (1) Within 30 days of assuming a public filer position or office described in § 2634.202 of this subpart, an individual shall file a public financial disclosure report containing the information prescribed in subpart C of this part.

(2) However, no report shall be required if the individual:

## § 2634.201

## 5 CFR Ch. XVI (1–1–16 Edition)

(i) Has, within 30 days prior to assuming such position, left another position or office for which a public financial disclosure report under the Act was required to be filed; or

(ii) Has already filed such a report as a nominee or candidate for the position.

*Example:* Y, an employee of the Treasury Department who has previously filed reports in accordance with the rules of this section, terminates employment with that Department on January 12, 1991, and begins employment with the Commerce Department on February 10, 1991, in a Senior Executive Service position. Y is not a new entrant since he has assumed a position described in § 2634.202 of this subpart within thirty days of leaving another position so described. Accordingly, he need not file a new report with the Commerce Department.

NOTE: While Y did not have to file a new entrant report with the Commerce Department, that Department should request a copy of the last report which he filed with the Treasury Department, so that Commerce could determine whether or not there would be any conflicts or potential conflicts in connection with Y's new employment. Additionally, Y will have to file an incumbent report covering the 1990 calendar year, in accordance with paragraph (a) of this section, due not later than May 15, 1991, with Commerce, which should provide a copy to Treasury so that both may review it.

(c) *Nominees.* (1) At any time after a public announcement by the President or President-elect of his intention to nominate an individual to an executive branch position, appointment to which requires the advice and consent of the Senate, such individual may, and in any event within five days after the transmittal of the nomination to the Senate shall, file a public financial disclosure report containing the information prescribed in subpart C of this part.

(2) This requirement shall not apply to any individual who is nominated to a position as:

(i) An officer of the uniformed services; or

(ii) A Foreign Service Officer.

NOTE: Although the statute, 5 U.S.C. app. (Ethics in Government Act of 1978, section 101(b)(1)), exempts uniformed service officers only if they are nominated for appointment to a grade or rank for which the pay grade is 0-6 or below, the Senate confirmation committees have adopted a practice of exempt-

ing all uniformed service officers, unless otherwise specified by the committee assigned.

(3) Section 2634.605(c) provides expedited procedures in the case of individuals described in paragraph (c)(1) of this section. Those individuals referred to in paragraph (c)(2) of this section as being exempt from filing nominee reports shall file new entrant reports, if required by paragraph (b) of this section.

(d) *Candidates.* A candidate (as defined in section 301 of the Federal Election Campaign Act of 1971, 2 U.S.C. 431) for nomination or election to the office of President or Vice President (other than an incumbent) shall file a public financial disclosure report containing the information prescribed in subpart C of this part, in accordance with the following:

(1) Within 30 days of becoming a candidate or on or before May 15 of the calendar year in which the individual becomes a candidate, whichever is later, but in no event later than 30 days before the election; and

(2) On or before May 15 of each successive year an individual continues to be a candidate. However, in any calendar year in which an individual continues to be a candidate but all elections relating to such candidacy were held in prior calendar years, the individual need not file a report unless he becomes a candidate for a vacancy during that year.

*Example:* P became a candidate for President in January 1991. P will be required to file a public financial disclosure report on or before May 15, 1991. If P had become a candidate on June 1, 1991, he would have been required to file a disclosure report within 30 days of that date.

(e) *Termination of employment.* (1) On or before the thirtieth day after termination of employment from a public filer position or office described in § 2634.202 of this subpart, an individual shall file a public financial disclosure report containing the information prescribed in subpart C of this part.

(2) However, if within 30 days of such termination the individual assumes employment in another position or office for which a public report under the Act is required to be filed, no report shall be required by the provisions of



## Office of Government Ethics

## § 2634.203

this paragraph. See the related *Example* in paragraph (b) of this section.

(f) *Extensions.* The reviewing official may, for good cause shown, grant to any public filer or class thereof an extension of time for filing which shall not exceed 45 days. The reviewing official may, for good cause shown, grant an additional extension of time which shall not exceed 45 days. The employee shall set forth in writing specific reasons why such additional extension of time is necessary. The reviewing official must approve or deny such requests in writing. Such records shall be maintained as part of the official report file. (For extensions on confidential financial disclosure reports, see § 2634.903(d).)

[57 FR 11806, Apr. 7, 1992; 57 FR 21854, May 22, 1992, as amended at 63 FR 69992, Dec. 18, 1998; 67 FR 49857, Aug. 1, 2002]

### § 2634.202 Public filer defined.

The term *public filer* includes:

(a) The President;

(b) The Vice President;

(c) Each officer or employee in the executive branch, including a special Government employee as defined in 18 U.S.C. 202(a), whose position is classified above GS-15 of the General Schedule prescribed by 5 U.S.C. 5332, or the rate of basic pay for which is fixed, other than under the General Schedule, at a rate equal to or greater than 120% of the minimum rate of basic pay for GS-15 of the General Schedule; each member of a uniformed service whose pay grade is at or in excess of O-7 under 37 U.S.C. 201; and each officer or employee in any other position determined by the Director of the Office of Government Ethics to be of equal classification;

(d) Each employee who is an administrative law judge appointed pursuant to 5 U.S.C. 3105;

(e) Any employee not otherwise described in paragraph (c) of this section who is in a position in the executive branch which is excepted from the competitive service by reason of being of a confidential or policy-making character, unless excluded by virtue of a determination under § 2634.203 of this subpart;

(f) The Postmaster General, the Deputy Postmaster General, each Gov-

ernor of the Board of Governors of the United States Postal Service and each officer or employee of the United States Postal Service or Postal Rate Commission whose basic rate of pay is equal to or greater than 120% of the minimum rate of basic pay for GS-15 of the General Schedule;

(g) The Director of the Office of Government Ethics and each agency's primary designated agency ethics official;

(h) Any civilian employee not otherwise described in paragraph (c) of this section who is employed in the Executive Office of the President (other than a special Government employee, as defined in 18 U.S.C. 202(a)) and holds a commission of appointment from the President; and

(i) Anyone whose employment in a position or office described in paragraphs (a) through (h) of this section has terminated, but who has not yet satisfied the filing requirements of § 2634.201(e) of this subpart.

NOTE: References in this section and in §§ 2634.203 and 2634.904 to position classifications have been adjusted to reflect elimination of General Schedule classifications GS-16, GS-17, and GS-18 by the Federal Employees Pay Comparability Act of 1990, as incorporated in section 529 of Public Law 101-509.

### § 2634.203 Persons excluded by rule.

(a) *In general.* Any individual or group of individuals described in § 2634.202(e) of this subpart (relating to positions of a confidential or policy-making character) may be excluded by rule from the public reporting requirements of this subpart when the Director of the Office of Government Ethics determines, in his sole discretion, that such exclusion would not affect adversely the integrity of the Government or the public's confidence in the integrity of the Government.

(b) *Exclusion determination.* The determination required by paragraph (a) of this section has been made for the following group of individuals who, therefore, may be excluded from the public reporting requirements of this subpart, pursuant to the procedures in paragraph (c) of this section: Individuals in any position classified at GS-15 of the General Schedule or below, or the rate of basic pay for which is less than 120%

## § 2634.204

## 5 CFR Ch. XVI (1–1–16 Edition)

of the minimum rate of basic pay fixed for GS-15, who have no policy-making role with respect to agency programs. Such individuals may include chauffeurs, private secretaries, stenographers, and others holding positions of a similar nature whose exclusion would be consistent with the basic criterion set forth in paragraph (a) of this section. See § 2634.904(a)(4) for possible coverage by confidential disclosure rules.

(c) *Procedure.* (1) The exclusion of any individual from reporting requirements pursuant to this section will be effective as of the time the employing agency files with the Office of Government Ethics a list and description of each position for which exclusion is sought, and the identity of any incumbent employees in those positions. Exclusions should be requested prior to due dates for the reports which such employees would otherwise have to file.

(2) If the Office of Government Ethics finds that one or more positions has been improperly excluded, it will advise the agency and set a date for the filing of the report.

[57 FR 11806, Apr. 7, 1992; 57 FR 21854, May 22, 1992, as amended at 58 FR 38912, July 21, 1993; 71 FR 28233, May 16, 2006]

### § 2634.204 Employment of sixty days or less.

(a) *In general.* Any public filer or nominee who, as determined by the official specified in this paragraph, is not reasonably expected to perform the duties of an office or position described in § 2634.201(c) or § 2634.202 of this subpart for more than 60 days in any calendar year shall not be subject to the reporting requirements of § 2634.201 (b), (c), or (e) of this subpart. This determination will be made by:

(1) The designated agency ethics official or Secretary concerned, in a case to which the provisions of § 2634.201 (b) or (e) of this subpart (relating to new entrant and termination reports) would otherwise apply; or

(2) The Director of the Office of Government Ethics, in a case to which the provisions of § 2634.201(c) of this subpart (relating to nominee reports) would otherwise apply.

(b) *Alternative reporting.* Any new entrant who is exempted from filing a

public financial report under paragraph (a) of this section and who is a special Government employee is subject to confidential reporting under § 2634.903(b). See § 2634.904(a)(2).

(c) *Exception.* If the public filer or nominee actually performs the duties of an office or position referred to in paragraph (a) of this section for more than 60 days in a calendar year, the public report otherwise required by:

(1) Section 2634.201 (b) or (c) of this subpart (relating to new entrant and nominee reports) shall be filed within 15 calendar days after the sixtieth day of duty; and

(2) Section 2634.201(e) of this subpart (relating to termination reports) shall be filed as provided in that paragraph.

[57 FR 11806, Apr. 7, 1992, as amended at 71 FR 28233, May 16, 2006]

### § 2634.205 Special waiver of public reporting requirements.

(a) *General rule.* In unusual circumstances, the Director of the Office of Government Ethics may grant a request for a waiver of the public reporting requirements under this subpart for an individual who is reasonably expected to perform, or has performed, the duties of an office or position for fewer than 130 days in a calendar year, but only if the Director determines that:

(1) The individual is a special Government employee, as defined in 18 U.S.C. 202(a), who performs temporary duties either on a full-time or intermittent basis;

(2) The individual is able to provide services specially needed by the Government;

(3) It is unlikely that the individual's outside employment or financial interests will create a conflict of interest; and

(4) Public financial disclosure by the individual is not necessary under the circumstances.

(b) *Procedure.* (1) Requests for waivers must be submitted to the Office of Government Ethics, via the requester's agency, within 10 days after an employee learns that he will hold a position which requires reporting and that he will serve in that position for more than 60 days in any calendar year, or

upon serving in such a position for more than 60 days, whichever is earlier.

(2) The request shall consist of:

(i) A cover letter which identifies the individual and his position, states the approximate number of days in a calendar year which he expects to serve in that position, and requests a waiver of public reporting requirements under this section;

(ii) An enclosure which states the reasons for the individual's belief that the conditions of paragraphs (a) (1) through (4) of this section are met in the particular case; and

(iii) The report otherwise required by this subpart B, as a factual basis for the determination required by this section. The report shall bear the legend at the top of page 1: "CONFIDENTIAL: WAIVER REQUEST PENDING PURSUANT TO 5 CFR 2634.205."

(3) The agency in which the individual serves shall advise the Office of Government Ethics as to the justification for a waiver.

(4) In the event a waiver is granted, the report shall not be subject to the public disclosure requirements of § 2634.603; however, the waiver request cover letter shall be subject to those requirements. In the event that a waiver is not granted, the confidential legend shall be removed from the report, and the report shall be subject to public disclosure; however, the waiver request cover letter shall not then be subject to public disclosure.

(Approved by the Office of Management and Budget under control number 3209-0004)

[57 FR 11806, Apr. 7, 1992, as amended at 59 FR 34756, July 7, 1994]

### Subpart C—Contents of Public Reports

SOURCE: 57 FR 11808, Apr. 7, 1992, unless otherwise noted.

#### § 2634.301 Interests in property.

(a) *In general.* Each financial disclosure report filed pursuant to this subpart shall include a brief description of any interest in property held by the filer at the end of the reporting period in a trade or business, or for investment or the production of income, having a fair market value in excess of

\$1,000. The report shall designate the category of value of the property in accordance with paragraph (d) of this section. Each item of real and personal property shall be disclosed separately. Note that for Individual Retirement Accounts (IRA's), brokerage accounts, trusts, mutual or pension funds and other entities with portfolio holdings, each underlying asset must be separately disclosed, unless the entity qualifies for special treatment under § 2634.310 of this subpart.

(b) *Types of property reportable.* Subject to the exceptions in paragraph (c) of this section, examples of the types of property required to be reported include, but are not limited to:

- (1) Real estate;
- (2) Stocks, bonds, securities, and futures contracts;
- (3) Livestock owned for commercial purposes;
- (4) Commercial crops, either standing or held in storage;
- (5) Antiques or art held for resale or investment;
- (6) Beneficial interests in trusts and estates;
- (7) Deposits in banks or other financial institutions;
- (8) Pensions and annuities;
- (9) Mutual funds;
- (10) Accounts or other funds receivable; and
- (11) Capital accounts or other asset ownership in a business.

(c) *Exceptions.* The following property interests are exempt from the reporting requirements under paragraphs (a) and (b) of this section:

- (1) Any personal liability owed to the filer, spouse, or dependent child by a spouse, or by a parent, brother, sister, or child of the filer, spouse, or dependent child;
- (2) Personal savings accounts (defined as any form of deposit in a bank, savings and loan association, credit union, or similar financial institution) in a single financial institution or holdings in a single money market mutual fund, aggregating \$5,000 or less in that institution or fund;
- (3) A personal residence of the filer or spouse, as defined in § 2634.105(1); and

## § 2634.302

## 5 CFR Ch. XVI (1–1–16 Edition)

(4) Financial interests in any retirement system of the United States (including the Thrift Savings Plan) or under the Social Security Act.

(d) *Valuation categories.* The valuation categories specified for property items are as follows:

- (1) Not more than \$15,000;
- (2) Greater than \$15,000 but not more than \$50,000;
- (3) Greater than \$50,000 but not more than \$100,000;
- (4) Greater than \$100,000 but not more than \$250,000;
- (5) Greater than \$250,000 but not more than \$500,000;
- (6) Greater than \$500,000 but not more than \$1,000,000; and
- (7) Greater than \$1,000,000;
- (8) Provided that, with respect to items held by the filer alone or held jointly by the filer with the filer's spouse and/or dependent children, the following additional categories over \$1,000,000 shall apply:
  - (i) Greater than \$1,000,000 but not more than \$5,000,000;
  - (ii) Greater than \$5,000,000 but not more than \$25,000,000;
  - (iii) Greater than \$25,000,000 but not more than \$50,000,000; and
  - (iv) Greater than \$50,000,000.

(e) *Valuation of interests in property.* A good faith estimate of the fair market value of interests in property may be made in any case in which the exact value cannot be obtained without undue hardship or expense to the filer. Fair market value may also be determined by:

- (1) The purchase price (in which case, the filer should indicate date of purchase);
- (2) Recent appraisal;
- (3) The assessed value for tax purposes (adjusted to reflect the market value of the property used for the assessment if the assessed value is computed at less than 100 percent of that market value);
- (4) The year-end book value of non-publicly traded stock, the year-end exchange value of corporate stock, or the face value of corporate bonds or comparable securities;
- (5) The net worth of a business partnership;
- (6) The equity value of an individually owned business; or

(7) Any other recognized indication of value (such as the last sale on a stock exchange).

*Example 1.* An official has a \$4,000 savings account in Bank A. His spouse has a \$2,500 certificate of deposit issued by Bank B and his dependent daughter has a \$200 savings account in Bank C. The official does not have to disclose the deposits, as the total value of the deposits in any one bank does not exceed \$5,000. Note, however, that the source and the amount of interest income from any bank is required to be reported under § 2634.302(b) of this subpart if it exceeds the reporting threshold for income. See § 2634.309 of this subpart for disclosure coverage of spouses and dependent children.

*Example 2.* Public filer R has a collection of post-impressionist paintings which have been carefully selected over the years. From time to time, as new paintings have been acquired to add to the collection, R has made sales of both less desirable works from his collection and paintings of various schools which he acquired through inheritance. Under these circumstances, R must report the value of all the paintings he retains as interests in property pursuant to this section, as well as income from the sales of paintings pursuant to § 2634.302(b) of this subpart. Recurrent sales from a collection indicate that the collection is being held for investment or the production of income.

*Example 3.* A reporting individual has investments which her broker holds as an IRA and invests in stocks, bonds, and mutual funds. Each such asset having a fair market value in excess of \$1,000 at the close of the reporting period must be separately listed, and the value must be shown. See § 2634.311(c) of this subpart for attachment of brokerage statements in lieu of listing, in the event of extensive holdings. Note that for a mutual fund held in this IRA investment account, its underlying assets must also be separately detailed, unless it qualifies as an excepted investment fund, pursuant to § 2634.310 of this subpart.

[57 FR 11808, Apr. 7, 1992; 57 FR 21854, May 22, 1992, as amended at 65 FR 69656, Nov. 20, 2000; 71 FR 28233, May 16, 2006]

### § 2634.302 Income.

(a) *Noninvestment income.* Each financial disclosure report filed pursuant to this subpart shall disclose the source, type, and the actual amount or value, of earned or other noninvestment income in excess of \$200 from any one source which is received by the filer or has accrued to his benefit during the reporting period, including:

(1) Salaries, fees, commissions, wages and any other compensation for personal services (other than from United States Government employment);

(2) Retirement benefits (other than from United States Government employment, including the Thrift Savings Plan, or from Social Security);

(3) Any honoraria, and the date services were provided, including payments made or to be made to charitable organizations on behalf of the filer in lieu of honoraria; and

(4) Any other noninvestment income, such as prizes, awards, or discharge of indebtedness.

**NOTE:** In calculating the amount of an honorarium, subtract any actual and necessary travel expenses incurred by the recipient and one relative. For example, if such expenses are paid or reimbursed by the honorarium source, they shall not be counted as part of the honorarium payment; if the expenses are paid or reimbursed by the individual receiving the honorarium, the amount of honorarium shall be reduced by the amount of such expenses.

*Example 1.* An official is a participant in a retirement plan of Coastal Airlines. Pursuant to such plan, the official and his spouse receive passage on some Coastal flights without charge, and they receive passage on other flights at a discounted fare. The difference between what Coastal charges members of the public generally and what the official and his spouse are charged for a particular flight is deemed income in-kind and must be disclosed by this reporting individual if it exceeds the \$200 threshold.

*Example 2.* An official serves on the board of directors at a bank, for which he receives a \$500 fee each calendar quarter. He also receives an annual fee of \$1,500 for service as trustee of a private trust. In both instances, such fees received or earned during the reporting period must be disclosed, and the actual amount must be shown.

(b) *Investment income.* Each financial disclosure report filed pursuant to this subpart shall disclose:

(1) The source and type of investment income, characterized as dividends, rents, interest, capital gains, or income from qualified or excepted trusts or excepted investment funds (see § 2634.310 of this subpart), which is received by the filer or accrued to his benefit during the reporting period, and which exceeds \$200 in amount or value from any one source. Examples include, but are not limited to, income derived from real estate, collectible items, stocks,

bonds, notes, copyrights, pensions, mutual funds, the investment portion of life insurance contracts, loans, and personal savings accounts (as defined in § 2634.301(c)(2) of this subpart). Note that for entities with portfolio holdings, such as Individual Retirement Accounts (IRA's), brokerage accounts, trusts, and mutual or pension funds, each underlying source of income must be separately disclosed, unless the entity qualifies for special treatment under § 2634.310 of this subpart. The amount or value of income from each reported source shall also be disclosed and categorized in accordance with the following table:

- (i) Not more than \$1,000;
- (ii) Greater than \$1,000 but not more than \$2,500;
- (iii) Greater than \$2,500 but not more than \$5,000;
- (iv) Greater than \$5,000 but not more than \$15,000;
- (v) Greater than \$15,000 but not more than \$50,000;
- (vi) Greater than \$50,000 but not more than \$100,000;
- (vii) Greater than \$100,000 but not more than \$1,000,000; and
- (viii) Greater than \$1,000,000;
- (ix) Provided that, with respect to investment income of the filer alone or joint investment income of the filer with the filer's spouse and/or dependent children, the following additional categories over \$1,000,000 shall apply:
  - (A) Greater than \$1,000,000 but not more than \$5,000,000; and
  - (B) Greater than \$5,000,000.

(2) The source, type, and the actual amount or value of gross income from a business, distributive share of a partnership, joint business venture income, payments from an estate or an annuity or endowment contract, or any other items of income not otherwise covered by paragraphs (a) or (b)(1) of this section which are received by the filer or accrued to his benefit during the reporting period and which exceed \$200 from any one source.

*Example 1.* An official rents out a portion of his residence. He receives rental income of \$600 from one individual for four months and \$1,200 from another individual for the remaining eight months of the year covered by his incumbent financial disclosure report. He must identify the property, specify the type of income (rent), and indicate the category

## § 2634.303

of the total amount of rent received. (He must also disclose the asset information required by § 2634.301 of this subpart.)

*Example 2.* A reporting individual has three savings accounts with Bank A. One is in his name and earned \$85 in interest during the reporting period. One is in a joint account with his spouse and earned \$120 in interest. One is in his name and his dependent daughter's name and earned \$35 in interest. Since the aggregate interest income from this source exceeds \$200, the official must disclose the name of the bank, the type of income, and the category of the total amount of interest earned from all three accounts. (He must also disclose the accounts as assets under § 2634.301 of this subpart if, in the aggregate, they total more than \$5,000 in that bank.)

*Example 3.* An official has an ownership interest in a fast-food restaurant, from which she receives \$10,000 in annual income. She must specify on her financial disclosure report the type of income, such as partnership distributive share or gross business income, and indicate the actual amount of such income. (Additionally, she must describe the business and categorize its asset value, pursuant to § 2634.301 of this subpart).

[57 FR 11808, Apr. 7, 1992; 57 FR 21854, May 22, 1992, as amended at 63 FR 43068, Aug. 12, 1998; 65 FR 69656, Nov. 20, 2000; 71 FR 28233, May 16, 2006; 72 FR 16986, Apr. 6, 2007]

### § 2634.303 Purchases, sales, and exchanges.

(a) *In general.* Except as indicated in § 2634.308(b) of this subpart, each financial disclosure report filed pursuant to this subpart shall include a brief description, the date and value (using the categories of value in § 2634.301(d) of this subpart) of any purchase, sale, or exchange by the filer during the reporting period, in which the amount involved in the transaction exceeds \$1,000:

(1) Of real property, other than a personal residence of the filer or spouse, as defined in § 2634.105(1) of this part; and

(2) Of stocks, bonds, commodity futures, mutual fund shares, and other forms of securities.

(b) *Exceptions.* (1) Any transaction solely by and between the reporting individual, his spouse, and dependent children need not be reported under paragraph (a) of this section.

(2) Transactions involving Treasury bills, notes, and bonds; money market mutual funds or accounts; and personal savings accounts (as defined in

## 5 CFR Ch. XVI (1–1–16 Edition)

§ 2634.301(c)(2) of this subpart) need not be reported when occurring at rates, terms, and conditions available generally to members of the public. Likewise, transactions involving portfolio holdings of trusts and investment funds described in § 2634.310 (b) and (c) of this subpart need not be reported.

(3) Any transaction which occurred at a time when the reporting individual was not a Federal Government officer or employee need not be reported under paragraph (a) of this section.

*Example 1.* An official sells her personal residence in Virginia for \$100,000 and purchases a personal residence in the District of Columbia for \$200,000. She need not report the sale of the Virginia residence or the purchase of the D.C. residence.

*Example 2.* An official sells his beach home in Maryland for \$50,000. Because he has rented it out for one month every summer, it does not qualify as a personal residence. He must disclose the sale under this section and any capital gain over \$200 realized on the sale under § 2634.302 of this subpart.

*Example 3.* An official sells a ranch to his dependent daughter. The official need not report the sale because it is a transaction between the reporting individual and a dependent child; however, any capital gain, except for that portion attributable to a personal residence, is required to be reported under § 2634.302 of this subpart.

*Example 4.* An official sells an apartment building and realizes a loss of \$100,000. He must report the sale of the building if the sale price of the property exceeds \$1,000; however, he need not report anything under § 2634.302 of this subpart, as the sale did not result in a capital gain.

[57 FR 11808, Apr. 7, 1992; 57 FR 21854, May 22, 1992, as amended at 71 FR 28233, May 16, 2006]

### § 2634.304 Gifts and reimbursements.

(a) *Gifts.* Except as indicated in § 2634.308(b), each financial disclosure report filed pursuant to this subpart shall contain the identity of the source, a brief description, and the value of all gifts aggregating more than \$375 in value which are received by the filer during the reporting period from any one source. For in-kind travel-related gifts, include a travel itinerary, dates, and nature of expenses provided.

(b) *Reimbursements.* Except as indicated in § 2634.308(b), each financial disclosure report filed pursuant to this subpart shall contain the identity of

the source, a brief description (including a travel itinerary, dates, and the nature of expenses provided), and the value of any travel-related reimbursements aggregating more than \$375 in value, which are received by the filer during the reporting period from any one source.

(c) *Exclusions.* Reports need not contain any information about gifts and reimbursements to which the provisions of this section would otherwise apply which are received from relatives (see § 2634.105(o)) or during a period in which the filer was not an officer or employee of the Federal Government. Additionally, any food, lodging, or entertainment received as “personal hospitality of any individual,” as defined in § 2634.105(k), need not be reported. See also exclusions specified in the definitions of gift and reimbursement, at § 2634.105(h) and (n).

(d) *Aggregation exception.* Any gift or reimbursement with a fair market value of \$150 or less need not be aggregated for purposes of the reporting rules of this section. However, the acceptance of gifts, whether or not reportable, is subject to the restrictions imposed by Executive Order 12674, as modified by Executive Order 12731, and the implementing regulations on standards of ethical conduct.

*Example 1.* An official accepts a print, a pen and pencil set, and a letter opener from a community service organization he has worked with solely in his private capacity. He determines, in accordance with paragraph (e) of this section, that these gifts are valued as follows:

Gift 1—Print: \$220

Gift 2—Pen and pencil set: \$185

Gift 3—Letter opener: \$20

The official must disclose Gifts 1 and 2, since together they aggregate more than \$375 in value from the same source. Gift 3 need not be aggregated, because its value does not exceed \$150.

*Example 2.* An official receives the following gifts from a single source:

1. Dinner for two at a local restaurant—\$120.
2. Round-trip taxi fare to meet donor at the restaurant—\$25.
3. Dinner at donor’s city residence—(value uncertain).
4. Round-trip airline transportation and hotel accommodations to visit Epcot Center in Florida—\$400.

5. Weekend at donor’s country home, including duck hunting and tennis match—(value uncertain).

The official need only disclose Gift 4. Gift 1 falls within the exclusion in § 2634.105(h)(4) for food and beverages not consumed in connection with a gift of overnight lodging. Gifts 3 and 5 need not be disclosed because they fall within the exception for personal hospitality of an individual. Gift 2 need not be aggregated and reported, because its value does not exceed \$150.

*Example 3.* An official receives free tickets from an outside source for himself and his spouse to attend an awards banquet at a local club. The value of each ticket is \$190. Even though this is a gift which exceeds the more than \$375 threshold amount for disclosure, the official need not report it, because of the exclusion in § 2634.105(h)(4) for food and beverages not consumed in connection with a gift of overnight lodging.

*NOTE:* Prior to accepting this gift of tickets, the individual should consult ethics officials at his agency to determine whether standards of conduct rules will permit acceptance, depending on whether or not the donor is a prohibited source and the exact nature of the event.

*Example 4.* An official is asked to speak at an out-of-town meeting on a matter which is unrelated to her official duties and her agency. The round-trip airfare exceeds \$375. If the official pays for the ticket and is then reimbursed by the organization to which she spoke, she must disclose this reimbursement under paragraph (b) of this section. If the organization simply provided the ticket, that must be disclosed as a gift under paragraph (a) of this section.

(e) *Valuation of gifts and reimbursements.* The value to be assigned to a gift or reimbursement is its fair market value. For most reimbursements, this will be the amount actually received. For gifts, the value should be determined in one of the following manners:

(1) If the gift has been newly purchased or is readily available in the market, the value shall be its retail price. The filer need not contact the donor, but may contact a retail establishment selling similar items to determine the present cost in the market.

(2) If the item is not readily available in the market, such as a piece of art, a handmade item, or an antique, the filer may make a good faith estimate of the value of the item.

(3) The term readily available in the market means that an item generally is available for retail purchase in the

## § 2634.305

metropolitan area nearest to the official's residence.

*Example.* Items such as a pen and pencil set, letter opener, leather case or engraved pen are generally available in the market and can be determined by contacting stores which sell like items and ascertaining the retail price of each.

**NOTE:** The market value of a ticket entitling the holder to attend an event which includes food, refreshments, entertainment or other benefits is the face value of the ticket, which may exceed the actual cost of the food and other benefits. The value of food and beverages may be excludable under § 2634.105(h)(4), if applicable, by making a good faith estimate, or by determining their actual cost from the caterer, restaurant, or similar source.

(f) *Waiver rule in the case of certain gifts—(1) In general.* In unusual cases, the value of a gift as defined in § 2634.105(h) need not be aggregated for reporting threshold purposes under this section, and therefore the gift need not be reported on an SF 278, if the Director of OGE receives a written request for and issues a waiver, after determining that:

(i) Both the basis of the relationship between the grantor and the grantee and the motivation behind the gift are personal; and

(ii) No countervailing public purpose requires public disclosure of the nature, source, and value of the gift.

*Example to paragraph (f)(1).* i. The Secretary of Education and her spouse receive the following two wedding gifts:

A. Gift 1—A crystal decanter valued at \$385 from the Secretary's former college roommate and lifelong friend, who is a real estate broker in Wyoming.

B. Gift 2—A gift of a print valued at \$400 from a business partner of the spouse, who owns a catering company.

ii. Under these circumstances, the Director of OGE may grant a request for a waiver of the requirement to aggregate and report on an SF 278 each of these gifts.

(2) *Public disclosure of waiver request.* If approved in whole or in part, the cover letter requesting the waiver shall be subject to the public disclosure requirements in § 2634.603 of this part.

(3) *Procedure.* (i) A public filer seeking a waiver under this paragraph (f) shall submit a request to the Office of Government Ethics, through his agency. The request shall be made by a cover letter which identifies the filer

## 5 CFR Ch. XVI (1–1–16 Edition)

and his position and which states that a waiver is requested under this section.

(ii) On an enclosure to the cover letter, the filer shall set forth:

(A) The identity and occupation of the donor;

(B) A statement that the relationship between the donor and the filer is personal in nature;

(C) A statement that neither the donor nor any person or organization who employs the donor or whom the donor represents, conducts or seeks business with, engages in activities regulated by, or is directly affected by action taken by, the agency employing the filer. If the preceding statement cannot be made without qualification, the filer shall indicate those qualifications, along with a statement demonstrating that he plays no role in any official action which might directly affect the donor or any organization for which the donor works or serves as a representative; and

(D) A brief description of the gift and the value of the gift.

(iii) With respect to the information required in paragraph (f)(3)(ii) of this section, if a gift has more than one donor, the filer shall provide the necessary information for each donor.

[57 FR 11808, Apr. 7, 1992; 57 FR 62605, Dec. 31, 1992, as amended at 63 FR 69992, Dec. 18, 1998; 64 FR 49640, Sept. 14, 1999; 65 FR 69656, Nov. 20, 2000; 67 FR 61762, Oct. 2, 2002; 70 FR 12112, Mar. 11, 2005; 71 FR 28233, May 16, 2006; 73 FR 15388, Mar. 24, 2008; 76 FR 38548, July 1, 2011; 79 FR 28606, May 19, 2014]

## § 2634.305 Liabilities.

(a) *In general.* Each financial disclosure report filed pursuant to this subpart shall identify and include a brief description of the filer's liabilities over \$10,000 owed to any creditor at any time during the reporting period, and the name of the creditors to whom such liabilities are owed. The report also shall designate the category of value of the liabilities in accordance with § 2634.301(d) of this subpart, using the greatest amount owed to the creditor during the period.

(b) *Exceptions.* The following are not required to be reported under paragraph (a) of this section:



## Office of Government Ethics

## § 2634.308

(1) Personal liabilities owed to a spouse or to the parent, brother, sister, or child of the filer, spouse, or dependent child;

(2) Any mortgage secured by a personal residence of the filer or his spouse;

(3) Any loan secured by a personal motor vehicle, household furniture, or appliances, provided that the loan does not exceed the purchase price of the item which secures it; and

(4) Any revolving charge account with an outstanding liability which does not exceed \$10,000 at the close of the reporting period.

*Example:* An incumbent official has the following debts outstanding at the end of the calendar year:

1. Mortgage on personal residence—\$80,000.
2. Mortgage on rental property—\$50,000.
3. VISA Card—\$1,000.
4. Master Card—\$11,000.
5. Loan balance of \$15,000, secured by family automobile purchased for \$16,200.
6. Loan balance of \$10,500, secured by antique furniture purchased for \$8,000.
7. Loan from parents—\$20,000.

The loans indicated in items 2, 4, and 6 must be disclosed. Loan 1 is exempt from disclosure under paragraph (b)(2) of this section because it is secured by the personal residence. Loan 3 need not be disclosed under paragraph (b)(4) of this section because it is considered to be a revolving charge account with an outstanding liability that does not exceed \$10,000 at the end of the reporting period. Loan 5 need not be disclosed under paragraph (b)(3) of this section because it is secured by a personal motor vehicle which was purchased for more than the value of the loan. Loan 7 need not be disclosed because the creditors are persons specified in paragraph (b)(1) of this section.

[57 FR 11808, Apr. 7, 1992, as amended at 71 FR 28233, May 16, 2006]

### § 2634.306 Agreements and arrangements.

Each financial disclosure report filed pursuant to this subpart shall identify the parties to and the date of, and shall briefly describe the terms of, any agreement or arrangement of the filer in existence at any time during the reporting period with respect to:

(a) Future employment;

(b) A leave of absence from employment during the period of the reporting individual's Government service;

(c) Continuation of payments by a former employer other than the United States Government; and

(d) Continuing participation in an employee welfare or benefit plan maintained by a former employer.

[57 FR 11808, Apr. 7, 1992, as amended at 71 FR 28234, May 16, 2006]

### § 2634.307 Outside positions.

(a) *In general.* Each financial disclosure report filed pursuant to this subpart shall identify all positions held at any time by the filer during the reporting period, as an officer, director, trustee, general partner, proprietor, representative, executor, employee, or consultant of any corporation, company, firm, partnership, trust, or other business enterprise, any nonprofit organization, any labor organization, or any educational or other institution other than the United States.

(b) *Exceptions.* The following need not be reported under paragraph (a) of this section:

(1) Positions held in any religious, social, fraternal, or political entity; and

(2) Positions solely of an honorary nature, such as those with an emeritus designation.

[57 FR 11808, Apr. 7, 1992; 57 FR 21854, May 22, 1992, as amended at 71 FR 28234, May 16, 2006]

### § 2634.308 Reporting periods and contents of public financial disclosure reports.

(a) *Incumbents.* Each financial disclosure report filed pursuant to § 2634.201(a) shall include on the standard form prescribed by the Office of Government Ethics consistent with subpart F of this part and in accordance with instructions issued by that Office, a full and complete statement of the information required to be reported according to the provisions of subpart C of this part, for the preceding calendar year (except for §§ 2634.303 and 2634.304, relating to transactions and gifts/reimbursements, for which the reporting period does not include any portion of the previous calendar year during which the filer was not a Federal employee), and in the case of §§ 2634.306 and 2634.307, to include the additional period up to the date of filing.

(b) *New entrants, nominees, and candidates.* Each financial disclosure report filed pursuant to § 2634.201(b), (c), or (d) shall include, on the standard form prescribed by the Office of Government Ethics consistent with subpart F of this part and in accordance with instructions issued by that Office, a full and complete statement of the information required to be reported according to the provisions of subpart C of this part, except for § 2634.303 (relating to purchases, sales, and exchanges of certain property) and § 2634.304 (relating to gifts and reimbursements). The following special rules apply:

(1) *Interests in property.* For purposes of § 2634.301 of this subpart, the report shall include all interests in property specified by that section which are held on or after a date which is fewer than thirty-one days before the date on which the report is filed.

(2) *Income.* For purposes of § 2634.302 of this subpart, the report shall include all income items specified by that section which are received or accrued during the period beginning on January 1 of the preceding calendar year and ending on the date on which the report is filed, except as otherwise provided by § 2634.606 relating to updated disclosure for nominees.

(3) *Liabilities.* For purposes of § 2634.305 of this subpart, the report shall include all liabilities specified by that section which are owed during the period beginning on January 1 of the preceding calendar year and ending fewer than thirty-one days before the date on which the report is filed.

(4) *Agreements and arrangements.* For purposes of § 2634.306 of this subpart, the report shall include only those agreements and arrangements which still exist at the time of filing.

(5) *Outside positions.* For purposes of § 2634.307 of this subpart, the report shall include all such positions held during the preceding two calendar years and the current calendar year up to the date of filing.

(6) *Certain sources of compensation.* Except in the case of the President, the Vice President, or a candidate referred to in § 2634.201(d), the report shall also identify the filer's sources of compensation which exceed \$5,000 during either of the preceding two calendar

years or during the current calendar year up to the date of filing, and shall briefly describe the nature of the duties performed or services rendered by the reporting individual for each such source of compensation. Information need not be reported, however, which is considered confidential as a result of a privileged relationship, established by law, between the reporting individual and any person. The report also need not contain any information with respect to any person for whom services were provided by any firm or association of which the reporting individual was a member, partner, or employee, unless such individual was directly involved in the provision of such services.

*Example:* A nominee who is a partner or employee of a law firm and who has worked on a matter involving a client from which the firm received over \$5,000 in fees during a calendar year must report the name of the client only if the value of the services rendered by the nominee exceeded \$5,000. The name of the client would not normally be considered confidential.

(c) *Termination reports.* Each financial disclosure report filed under § 2634.201(e) shall include, on the standard form prescribed by the Office of Government Ethics consistent with subpart F of this part and in accordance with instructions issued by that Office, a full and complete statement of the information required to be reported according to the provisions of subpart C of this part, for the period beginning on the last date covered by the most recent financial disclosure report filed by the reporting individual under this part, or on January 1 of the preceding calendar year, whichever is later, and ending on the date on which the filer's employment terminates.

[57 FR 11808, Apr. 7, 1992, as amended at 67 FR 57938, Sept. 13, 2002; 71 FR 28234, May 16, 2006]

#### § 2634.309 Spouses and dependent children.

(a) *Special disclosure rules.* Each report required by the provisions of subpart B of this part shall also include the following information with respect to the spouse or dependent children of the reporting individual:

## Office of Government Ethics

## §2634.310

(1) *Income.* For purposes of §2634.302 of this subpart:

(i) With respect to a spouse, the source but not the amount of items of earned income (other than honoraria) which exceed \$1,000 from any one source; and if items of earned income are derived from a spouse's self-employment in a business or profession, the nature of the business or profession but not the amount of the earned income;

(ii) With respect to a spouse, the source and the actual amount or value of any honoraria received by or accrued to the spouse (or payments made or to be made to charity on the spouse's behalf in lieu of honoraria) which exceed \$200 from any one source, and the date on which the services were provided; and

(iii) With respect to a spouse or dependent child, the type and source, and the amount or value (category or actual amount, in accordance with §2634.302 of this subpart), of all other income exceeding \$200 from any one source, such as investment income from interests in property (if the property itself is reportable according to §2634.301 of this subpart).

*Example 1.* The spouse of a filer is employed as a teller at Bank X and earns \$23,000 per year. The report must disclose that the spouse is employed by Bank X. The amount of the spouse's earnings need not be disclosed.

*Example 2.* The spouse of a reporting individual is self-employed as a pediatrician. The report must disclose that he is a physician, but need not disclose the amount of income.

(2) *Gifts and reimbursements.* For purposes of §2634.304 of this subpart, gifts and reimbursements received by a spouse or dependent child which are not received totally independent of their relationship to the filer.

(3) *Interests in property, transactions, and liabilities.* For purposes of §§2634.301, 2634.303, and 2634.305 of this subpart, all information concerning property interests, transactions, or liabilities referred to by those sections of a spouse or dependent child, unless the following three conditions are satisfied:

(i) The filer certifies that the item represents the spouse's or dependent child's sole financial interest or re-

sponsibility, and that the filer has no specific knowledge regarding that item;

(ii) The item is not in any way, past or present, derived from the income, assets or activities of the filer; and

(iii) The filer neither derives, nor expects to derive, any financial or economic benefit from the item.

NOTE: One who prepares a joint tax return with his spouse will normally derive a financial or economic benefit from assets held by the spouse, and will also be charged with knowledge of such items; therefore he could not avail himself of this exception. Likewise, a trust for the education of one's minor child normally will convey a financial benefit to the parent. If so, the assets of the trust would be reportable on a financial disclosure statement.

(b) *Exception.* For reports filed as a new entrant, nominee, or candidate under §2634.201(b), (c), or (d), no information regarding gifts and reimbursements or transactions is required for a spouse or dependent child.

(c) *Divorce and separation.* A reporting individual need not report any information about:

(1) A spouse living separate and apart from the reporting individual with the intention of terminating the marriage or providing for permanent separation;

(2) A former spouse or a spouse from whom the reporting individual is permanently separated; or

(3) Any income or obligations of the reporting individual arising from dissolution of the reporting individual's marriage or permanent separation from a spouse.

[57 FR 11808, Apr. 7, 1992, as amended at 71 FR 28234, May 16, 2006]

### §2634.310 Trusts, estates, and investment funds.

(a) *In general.* (1) Except as otherwise provided in this section, each financial disclosure report shall include the information required by this subpart about the holdings of and income from the holdings of any trust, estate, investment fund or other financial arrangement from which income is received by, or with respect to which a beneficial interest in principal or income is held by, the filer, his spouse, or dependent child.

(2) No information, however, is required about a nonvested beneficial interest in the principal or income of an estate or trust. A vested interest is a present right or title to property, which carries with it an existing right of alienation, even though the right to possession or enjoyment may be postponed to some uncertain time in the future. This includes a future interest when one has a right, defeasible or indefeasible, to the immediate possession or enjoyment of the property, upon the ceasing of another's interest. Accordingly, it is not the uncertainty of the time of enjoyment in the future, but the uncertainty of the right of enjoyment (title and alienation), which differentiates a "vested" and a "non-vested" interest.

NOTE TO PARAGRAPH (a): Nothing in this section requires the reporting of the holdings or income of a revocable inter vivos trust (also known as a "living trust") with respect to which the filer, his spouse or dependent child has only a remainder interest, whether or not vested, provided that the grantor of the trust is neither the filer, the filer's spouse, nor the filer's dependent child. Furthermore, nothing in this section requires the reporting of the holdings or income of a revocable inter vivos trust from which the filer, his spouse or dependent child receives any discretionary distribution, provided that the grantor of the trust is neither the filer, the filer's spouse, nor the filer's dependent child.

(b) *Qualified trusts and excepted trusts.*

(1) A filer should not report information about the holdings of or income from holdings of, any qualified blind trust (as defined in § 2634.402) or any qualified diversified trust (as defined in § 2634.402). For a qualified blind trust, a public financial disclosure report shall disclose the category of the aggregate amount of the trust's income attributable to the beneficial interest of the filer, his spouse, or dependent child in the trust. For a qualified diversified trust, a public financial disclosure report shall disclose the category of the aggregate amount of income with respect to such a trust which is actually received by the filer, his spouse, or dependent child, or applied for the benefit of any of them.

(2) In the case of an excepted trust, a filer should indicate the general nature of its holdings, to the extent known,

but will not otherwise need to report information about the trust's holdings or income from holdings. The category of the aggregate amount of income from an excepted trust which is received by or accrued to the benefit of the filer, his spouse, or dependent child shall be reported on public financial disclosure reports. For purposes of this part, the term "excepted trust" means a trust:

(i) Which was not created directly by the filer, spouse, or dependent child; and

(ii) The holdings or sources of income of which the filer, spouse, or dependent child have no specific knowledge through a report, disclosure, or constructive receipt, whether intended or inadvertent.

(c) *Excepted investment funds.* (1) No information is required under paragraph (a) of this section about the underlying holdings of or income from underlying holdings of an *excepted investment fund* as defined in paragraph (c)(2) of this section, except that the fund itself shall be identified as an interest in property and/or a source of income. Filers must also disclose the category of value of the fund interest held; aggregate amount of income from the fund which is received by or accrued to the benefit of the filer, his spouse, or dependent child; and value of any transactions involving shares or units of the fund.

(2) For purposes of financial disclosure reports filed under the provisions of this part, an "excepted investment fund" means a widely held investment fund (whether a mutual fund, regulated investment company, common trust fund maintained by a bank or similar financial institution, pension or deferred compensation plan, or any other investment fund), if:

(i)(A) The fund is publicly traded or available; or

(B) The assets of the fund are widely diversified; and

(ii) The filer neither exercises control over nor has the ability to exercise control over the financial interests held by the fund.

(3) A fund is widely diversified if it holds no more than 5% of the value of its portfolio in the securities of any one issuer (other than the United

States Government) and no more than 20% in any particular economic or geographic sector.

[57 FR 11808, Apr. 7, 1992; 57 FR 21854, May 22, 1992, as amended at 67 FR 37967, May 31, 2002; 71 FR 28234, May 16, 2006; 77 FR 39144, July 2, 2012]

#### § 2634.311 Special rules.

(a) *Political campaign funds.* Political campaign funds, including campaign receipts and expenditures, need not be included in any report filed under this part. However, if the individual has authority to exercise control over the fund's assets for personal use rather than campaign or political purposes, that portion of the fund over which such authority exists must be reported.

(b) *Certificates of Divestiture.* Each report required by the provisions of this subpart shall identify those sales which have occurred pursuant to a Certificate of Divestiture during the period covered by such report. See subpart J of this part for the rules relating to the issuance of such Certificates.

(c) *Reporting standards.* (1) In lieu of entering data on a schedule of the report form designated by the Office of Government Ethics, a filer may attach to the reporting form a copy of a brokerage report, bank statement, or other material, which, in a clear and concise fashion, readily discloses all information which the filer would otherwise have been required to enter on the schedule.

(2) In lieu of reporting the category of amount or value of any item listed in any report filed pursuant to this subpart, a filer may report the actual dollar amount of such item.

[57 FR 11808, Apr. 7, 1992, as amended at 71 FR 28234, May 16, 2006]

### Subpart D—Qualified Trusts

SOURCE: 77 FR 39144, July 2, 2012, unless otherwise noted.

#### § 2634.401 Overview.

(a) *Purpose.* The Ethics in Government Act of 1978 created two types of qualified trusts, the qualified blind trust and the qualified diversified trust, that may be used by employees to reduce real or apparent conflicts of

interest. The primary purpose of an executive branch qualified trust is to confer on an independent trustee and any other designated fiduciary the sole responsibility to administer the trust and to manage trust assets without participation by, or the knowledge of, any interested party or any representative of an interested party. This responsibility includes the duty to decide when and to what extent the original assets of the trust are to be sold or disposed of, and in what investments the proceeds of sale are to be reinvested. Because the requirements set forth in the Ethics in Government Act and this regulation assure true “blindness,” employees who have a qualified trust cannot be influenced in the performance of their official duties by their financial interests in the trust assets. Their official actions, under these circumstances, should be free from collateral attack arising out of real or apparent conflicts of interest.

(b) *Scope.* Two characteristics of the qualified trust assure that true “blindness” exists: the independence of the trustee and the restriction on communications between the independent trustee and the interested parties. In order to serve as a trustee for an executive branch qualified trust, an entity must meet the strict requirements for independence set forth in the Ethics in Government Act and this regulation. Restrictions on communications also reinforce the independence of the trustee from the interested parties. During both the establishment of the trust and the administration of the trust, communications are limited to certain reports that are required by the Act and to written communications that are pre-screened by the Office of Government Ethics. No other communications, even about matters not connected to the trust, are permitted between the independent trustee and the interested parties.

#### § 2634.402 Definitions.

As used in this subpart:

*Director* means the Director of the Office of Government Ethics.

*Employee* means an officer or employee of the executive branch of the United States.

## § 2634.403

## 5 CFR Ch. XVI (1–1–16 Edition)

*Independent trustee* means a trustee who meets the requirements of § 2634.405 of this subpart and who is approved by the Director under this subpart.

*Interested party* means an employee, the employee's spouse, and any minor or dependent child, in any case in which the employee, spouse, or minor or dependent child has a beneficial interest in the principal or income of a trust proposed for certification under this subpart or certified under this subpart.

*Qualified blind trust* means a trust in which the employee, his spouse, or his minor or dependent child has a beneficial interest and which:

- (1) Is certified pursuant to § 2634.407 by the Director;
- (2) Has a portfolio as specified in § 2634.406(a);
- (3) Follows the model trust document prepared by the Office of Government Ethics; and
- (4) Has an independent trustee as defined in § 2634.405.

*Qualified diversified trust* means a trust in which the employee, his spouse, or his minor or dependent child has a beneficial interest and which:

- (1) Is certified pursuant to § 2634.407 by the Director;
- (2) Has a portfolio as specified in § 2634.406(b);
- (3) Follows the model trust document prepared by the Office of Government Ethics; and
- (4) Has an independent trustee as defined in § 2634.405.

*Qualified trust* means a trust described in the Ethics in Government Act of 1978 and this regulation and certified by the Director under this subpart. There are two types of qualified trusts, the qualified blind trust and the qualified diversified trust.

### § 2634.403 General description of trusts.

(a) *Qualified blind trust.* (1) The qualified blind trust is the most universally adaptable qualified trust. An interested party may put most types of assets (such as cash, stocks, bonds, mutual funds or real estate) into a qualified blind trust.

(2) In the case of a qualified blind trust, 18 U.S.C. 208 and other Federal

conflict of interest statutes and regulations apply to the assets that an interested party transfers to the trust until such time as he or she is notified by the independent trustee that such asset has been disposed of or has a value of less than \$1,000. Because the employee knows what assets he or she placed in the trust and there is no requirement that these assets be diversified, the possibility still exists that the employee could be influenced in the performance of official duties by those interests.

(b) *Qualified diversified trust.* (1) An interested party may put only readily marketable securities into a qualified diversified trust. In addition, the portfolio must meet the diversification requirements of § 2634.406(b)(2).

(2) In the case of a qualified diversified trust, the conflict of interest laws do not apply to the assets that an interested party transfers to the trust. Because the assets that an interested party puts into this trust must meet the diversification requirements set forth in this regulation, the diversification achieves “blindness” with regard to the initial assets.

(3) *Special notice for Presidential appointees—(i) In general.* In any case in which the establishment of a qualified diversified trust is contemplated with respect to an individual whose nomination is being considered by a Senate committee, that individual shall inform the committee of the intention to establish a qualified diversified trust at the time of filing a financial disclosure report with the committee. There is a section on the public financial disclosure form, the OGE Form 278, for the individual to indicate whether he or she intends to create a qualified diversified trust.

(ii) *Applicability.* Paragraph (b)(3)(i) of this section is not applicable to members of the uniformed services or Foreign Service officers. The special notice requirement of this section shall not preclude an individual from seeking the certification of a qualified blind trust or qualified diversified trust after the Senate has given its advice and consent to a nomination.

(c) *Conflict of interest laws.* In the case of each type of trust, the conflict of interest laws do not apply to the assets

that the independent trustee or any other designated fiduciary adds to the trust.

**§ 2634.404 Summary of procedures for creation of a qualified trust.**

(a) *Consultation with the Office of Government Ethics.* Any employee, spouse, or minor or dependent child (or that party's representative) who is interested in setting up a qualified blind or qualified diversified trust must contact the Office of Government Ethics prior to beginning the process of creating the trust. The Office of Government Ethics is the only entity that has the authority to certify a qualified trust. Because an interested party must propose, for the approval of the Office of Government Ethics, an entity to serve as the independent trustee, the Office of Government Ethics will explain the requirements that an entity must meet in order to qualify as an independent trustee. Such information is essential in order for the employee to interview entities for the position of independent trustee. The Office of Government Ethics will also explain the restrictions on the communications between the interested parties and the proposed trustee.

(b) *Selecting an independent trustee.* After consulting with the Office of Government Ethics, the interested party may interview entities who meet the requirements of § 2634.405(a) in order to find one to serve as an independent trustee. At an interview, the interested party may ask general questions about the institution, such as how long it has been in business, its policies and philosophy in managing assets, the types of clients it serves, its prior performance record, and the qualifications of the personnel who would be handling the trust. Because the purpose of a qualified trust is to give an independent trustee the sole responsibility to manage the trust assets without the interested party having any knowledge of the identity of the assets in the trust, the interested party may communicate his or her general financial interests and needs to any institution which he or she interviews. For example, the interested party may communicate a preference for maximizing income or long-term capital gain or for balancing safety of capital

with growth. The interested party may not give more specific instructions to the proposed trustee, such as instructing it to maintain a specific allocation between stocks and bonds, or choosing stocks in a particular industry.

(c) *The proposed independent trustee.*

(1) The entity selected by an interested party as a possible trustee must contact the Office of Government Ethics to receive guidance on the qualified trust program. The Office of Government Ethics will ask the proposed trustee to submit a letter describing its past and current contacts, including banking and client relationships, with the employee, spouse, and minor or dependent children. The extent of these contacts will determine whether the proposed trustee is independent under the Act and this regulation.

(2) In addition, an interested party may select an investment manager or other fiduciary. Other proposed fiduciaries selected by an interested party, such as an investment manager, must meet the independence requirements.

(d) *Approval of the independent trustee.* If the Director determines that the proposed trustee meets the requirements of independence, the Director will approve, in writing, that entity as the trustee for the qualified trust.

(e) *Confidentiality agreement.* If any person other than the independent trustee or designated fiduciary has access to information that must not be shared with an interested party or that party's representative, that person must file a Confidentiality Agreement with the Office of Government Ethics. Persons filing a Confidentiality Agreement must certify that they will not make prohibited contacts with an interested party or that party's representative.

(f) *Drafting the trust instrument.* The representative of the interested party will use the model documents provided by the Office of Government Ethics to draft the trust instrument. There are two annexes to the model trust document: An annex describing any current, permissible banking or client relationships between any interested parties and the independent trustee or other fiduciaries and an annex listing the initial assets that the interested

party transfers to the trust. Any deviations from the model trust documents must be approved by the Director.

(g) *Certification of the trust.* The representative then presents the unexecuted trust instrument to the Office of Government Ethics for review. If the Director finds that the instrument conforms to one of the model documents, the Director will certify the qualified trust. After certification, the employee and the independent trustee will sign the trust instrument. They will submit a copy of the executed instrument to the Office of Government Ethics within 30 days of execution. The employee will then transfer the assets to the trust.

NOTE TO PARAGRAPH (g): Existing qualified trusts approved under any State law or by the legislative or judicial branches of the Federal Government of the United States will not be recertified by the Director. Individuals with existing qualified trusts who are required to file a financial disclosure report upon entering the executive branch, becoming a nominee for a position appointed by the President and subject to confirmation by the Senate, or becoming a candidate for President or Vice President must file a complete financial disclosure form that includes a full disclosure of items in the trust. After filing a complete form, the individual may establish a qualified trust under the policies and provisions of this rule.

**§ 2634.405 Standards for becoming an independent trustee or other fiduciary.**

(a) *Eligible entities.* An interested party must select an entity that meets the requirements of this regulation to serve as an independent trustee or other fiduciary. The type of entity that is allowed to serve as an independent trustee is a financial institution, not more than 10 percent of which is owned or controlled by a single individual, which is:

- (1) A bank, as defined in 12 U.S.C. 1841(c); or
- (2) An investment adviser, as defined in 15 U.S.C. 80b–2(a)(11).

NOTE TO PARAGRAPH (a): By the terms of paragraph (3)(A)(i) of section 102(f) of the Act, an individual who is an attorney, a certified public accountant, a broker, or an investment adviser is also eligible to serve as an independent trustee. However, experience of the Office of Government Ethics over the years dictates the necessity of limiting serv-

ice as a trustee or other fiduciary to the financial institutions referred to in this paragraph, to maintain effective administration of trust arrangements and preserve confidence in the Federal qualified trust program. Accordingly, under its authority pursuant to paragraph (3)(D) of section 102(f) of the Act, the Office of Government Ethics will not approve proposed trustees or other fiduciaries who are not financial institutions, except in unusual cases where compelling necessity is demonstrated to the Director, in his or her sole discretion.

(b) *Orientation.* After the interested party selects a proposed trustee, that proposed trustee should contact the Office of Government Ethics for an orientation about the qualified trust program.

(c) *Independence requirements.* The Director shall determine that a proposed trustee is independent if:

- (1) The entity is independent of and unassociated with any interested party so that it cannot be controlled or influenced in the administration of the trust by any interested party;
- (2) The entity is not and has not been affiliated with any interested party, and is not a partner of, or involved in any joint venture or other investment or business with, any interested party; and
- (3) Any director, officer, or employee of such entity:
  - (i) Is independent of and unassociated with any interested party so that such director, officer, or employee cannot be controlled or influenced in the administration of the trust by any interested party;
  - (ii) Is not and has not been employed by any interested party, not served as a director, officer, or employee of any organization affiliated with any interested party, and is not and has not been a partner of, or involved in any joint venture or other investment with, any interested party; and
  - (iii) Is not a relative of any interested party.

(d) *Required documents.* In order to make this determination, the proposed trustee must submit the following documentation to the Director:

- (1) A letter describing its past and current contacts, including banking and client relationships, with the employee, spouse, or minor or dependent child; and



(2) The Certificate of Independence, which must be executed in the form prescribed in appendix A to this part.

(e) *Determination.* If the Director determines that the current relationships, if any, between the interested party and the independent trustee do not violate the independence requirements, these relationships will be disclosed in an annex to the trust instrument. No additional relationships with the independent trustee may be established unless they are approved by the Director.

(f) *Approval of the trustee.* If the Director determines that the proposed trustee meets applicable requirements, the Office of Government Ethics will send the interested parties and their representatives a letter indicating its approval of a proposed trustee.

(g) *Revocation.* The Director may revoke the approval of a trustee or any other designated fiduciary pursuant to the rules of subpart E of this part.

(h) *Adding fiduciaries.* An independent trustee may employ or consult other entities, such as investment counsel, investment advisers, accountants, and tax preparers, to assist in any capacity to administer the trust or to manage and control the trust assets, if all of the following conditions are met:

(1) When any interested party or any representative of an interested party learns about such employment or consultation, the person must sign the trust instrument as a party, subject to the prior approval of the Director;

(2) Under all the facts and circumstances, the person is determined pursuant to the requirements for eligible entities under paragraphs (a) through (f) of this section to be independent of an interested party with respect to the trust arrangement;

(3) The person is instructed by the independent trustee or other designated fiduciary not to disclose publicly or to any interested party information which might specifically identify current trust assets or those assets which have been sold or disposed of from trust holdings, other than information relating to the sale or disposition of original trust assets in the case of the blind trust; and

(4) The person is instructed by the independent trustee or other des-

ignated fiduciary to have no direct communication with respect to the trust with any interested party or any representative of an interested party, and to make all indirect communications with respect to the trust only through the independent trustee, pursuant to § 2634.408(a).

#### § 2634.406 Initial portfolio.

(a) *Qualified blind trust.* (1) None of the assets initially placed in the portfolio of the blind trust shall include assets the holding of which by any interested party would be prohibited by the Act, by the implementing regulations, or by any other applicable Federal law, Executive order, or regulation.

(2) Except as described in paragraph (a)(1) of this section, an interested party may put most types of assets (such as cash, stocks, bonds, mutual funds or real estate) into a qualified blind trust.

(b) *Qualified diversified trust.* (1) The initial portfolio may not contain securities of entities having substantial activities in the employee's primary area of Federal responsibility. If requested by the Director, the designated agency ethics official for the employee's agency shall certify whether the proposed portfolio meets this standard.

(2) The initial assets of a diversified trust shall comprise a widely diversified portfolio of readily marketable securities.

(i) A portfolio will be widely diversified if:

(A) The value of the securities concentrated in any particular or limited economic or geographic sector is no more than twenty percent of the total; and

(B) The value of the securities of any single entity (other than the United States Government) is no more than five percent of the total.

(ii) A security will be readily marketable if:

(A) Daily price quotations for the security appear regularly in newspapers of general circulation; and

(B) The trust holds the security in a quantity that does not unduly impair liquidity.

(iii) The interested party or the party's representative shall provide the

## § 2634.407

## 5 CFR Ch. XVI (1–1–16 Edition)

Director with a detailed list of the securities proposed for inclusion in the portfolio, specifying their fair market value and demonstrating that these securities meet the requirements of this paragraph. The Director will determine whether the initial assets of the trust proposed for certification comprise a widely diversified portfolio of readily marketable securities.

(iv) The independent trustee shall not acquire additional securities in excess of the diversification standards.

(c) *Hybrid qualified trust.* A qualified trust may contain both a blind portfolio of assets and a diversified portfolio of assets. The Office of Government Ethics refers to this arrangement as a hybrid qualified trust.

### § 2634.407 Certification of qualified trust by the Office of Government Ethics.

(a) *General.* After the Director approves the independent trustee, the employee or a representative will prepare the trust instrument for review by the Director. The representative of the interested party will use the model documents provided by the Office of Government Ethics to draft the trust instrument. Any deviations from the model trust documents must be approved by the Director. No trust will be considered qualified for purposes of the Act until the Office of Government Ethics certifies the trust prior to execution.

(b) *Certification procedures.* (1) After the Director has approved the trustee, the interested party or the party's representative must submit the following documents to the Office of Government Ethics for review:

(i) A copy of the proposed, unexecuted trust instrument;

(ii) A list of the assets which the employee, spouse, or minor or dependent child proposes to place in the trust; and

(iii) In the case of a pre-existing trust as described in § 2634.409 of this subpart which the employee asks the Office of Government Ethics to certify, a copy of the pre-existing trust instrument and a list of that trust's assets categorized as to value in accordance with § 2634.301(d).

(2) In order to assure timely trust certification, the interested parties and their representatives shall be responsible for the expeditious submission to the Office of Government Ethics of all required documents and responses to requests for information.

(3) The Director will indicate that he or she has certified the trust in a letter to the interested parties or their representatives. The interested party and the independent trustee may then execute the trust instrument.

(4) Within thirty days after the trust is certified under this section by the Director, the interested party or that party's representative must file with the Director a copy of the executed trust instrument and all annexed schedules (other than those provisions which relate to the testamentary disposition of the trust assets), including a list of the assets which were transferred to the trust, categorized as to value of each asset in accordance with § 2634.301(d).

(5) Once a trust is classified as a qualified blind or qualified diversified trust in the manner discussed in this section, § 2634.310(b) applies less inclusive financial disclosure requirements to the trust assets.

(c) *Certification standard.* A trust will be certified for purposes of this subpart only if:

(1) It is established to the Director's satisfaction that the requirements of section 102(f) of the Act and this subpart have been met; and

(2) The Director determines that approval of the trust arrangement as a qualified trust is appropriate to assure compliance with applicable laws and regulations.

(d) *Revocation.* The Director may revoke certification of a trust pursuant to the rules of subpart E of this part.

### § 2634.408 Administration of a qualified trust.

(a) *General rules on communications between the independent fiduciaries and the interested parties.* (1) There shall be no direct or indirect communications with respect to the qualified trust between an interested party or the party's representative and the independent trustee or any other designated fiduciary with respect to the trust unless:

## Office of Government Ethics

## § 2634.408

(i) In the case of the blind trust, the proposed communication is approved in advance by the Director and it relates to:

(A) A distribution of cash or other unspecified assets of the trust;

(B) The general financial interest and needs of the interested party including, but not limited to, a preference for maximizing income or long-term capital gain;

(C) Notification to the independent trustee by the employee that the employee is prohibited by a subsequently applicable statute, Executive order, or regulation from holding an asset, and to direction to the independent trustee that the trust shall not hold that asset; or

(D) Instructions to the independent trustee to sell all of an asset which was initially placed in the trust by an interested party, and which in the determination of the employee creates a real or apparent conflict due to duties the employee subsequently assumed (but nothing herein requires such instructions); or

(ii) In the case of the diversified trust, the proposed communication is approved in advance by the Director and it relates to:

(A) A distribution of cash or other unspecified assets of the trust;

(B) The general financial interest and needs of the interested party including, but not limited to, a preference for maximizing income or long-term capital gain; or

(C) Information, documents, and funds concerning income tax obligations arising from sources other than the property held in trust that are required by the independent trustee to enable him to file, on behalf of an interested party, the personal income tax returns and similar tax documents which may contain information relating to the trust.

(2) The person initiating a communication approved under paragraphs (a)(1)(i) or (a)(1)(ii) of this section shall file a copy of the communication with the Director within five days of the date of its transmission.

NOTE TO PARAGRAPH (a): By the terms of paragraph (3)(C)(vi) of section 102(f) of the Act, communications which solely consist of requests for distributions of cash or other

unspecified assets of the trust are not required to be in writing. Further, there is no statutory mechanism for pre-screening of proposed communications. However, experience of the Office of Government Ethics over the years dictates the necessity of prohibiting any oral communications between the trustee and an interested party with respect to the trust and pre-screening all proposed written communications, to prevent inadvertent prohibited communications and preserve confidence in the Federal qualified trust program. Accordingly, under its authority pursuant to paragraph (3)(D) of section 102(f) of the Act, the Office of Government Ethics will not approve proposed trust instruments that do not contain language conforming to this policy, except in unusual cases where compelling necessity is demonstrated to the Director, in his or her sole discretion.

(b) *Required reports from the independent trustee to the interested parties—*

(1) *Quarterly reports.* The independent trustee shall, without identifying specifically an asset or holding, report quarterly to the interested parties and their representatives the aggregate market value of the assets representing the interested party's interest in the trust. The independent trustee must follow the model document for this report and shall file a copy of the report, within five days of the date of its transmission, with the Director.

(2) *Annual report.* In the case of a qualified blind trust, the independent trustee shall, without identifying specifically an asset or holding, report annually to the interested parties and their representatives the aggregate amount of the trust's income attributable to the interested party's beneficial interest in the trust, categorized in accordance with § 2634.302(b) to enable the employee to complete the public financial disclosure form. In the case of a qualified diversified trust, the independent trustee shall, without identifying specifically an asset or holding, report annually to the interested parties and their representatives the aggregate amount actually distributed from the trust to the interested party or applied for the party's benefit. Additionally, in the case of the blind trust, the independent trustee shall report on Schedule K-1 the net income or loss of the trust and any other information necessary to enable the interested party to complete an individual

tax return. The independent trustee must follow the model document for each report and shall file a copy of the report, within five days of the date of its transmission, with the Director.

(3) *Report of sale of asset.* In the case of the qualified blind trust, the independent trustee shall promptly notify the employee and the Director when any particular asset transferred to the trust by an interested party has been completely disposed of or when the value of that asset is reduced to less than \$1,000. The independent trustee shall file a copy of the report, within five days of the date of its transmission, with the Director.

(c) *Communications regarding trust and beneficiary taxes.* The Act establishes special tax filing procedures to be used by the independent trustee and the trust beneficiaries in order to maintain the substantive separation between trust beneficiaries and trust administrators.

(1) *Trust taxes.* Because a trust is a separate entity distinct from its beneficiaries, an independent trustee must file an annual fiduciary tax return for the trust (IRS Form 1041). The independent trustee is prohibited from providing the interested parties and their representatives with a copy of the trust tax return.

(2) *Beneficiary taxes.* The trust beneficiaries must report income received from the trust on their individual tax returns.

(i) For beneficiaries of qualified blind trusts, the independent trustee sends a modified K-1 summarizing trust income in appropriate categories to enable the beneficiaries to file individual tax returns. The independent trustee is prohibited from providing the interested parties or their representatives with the identity of the assets.

(ii) For beneficiaries of qualified diversified trusts, the Act requires the independent trustee to file the individual tax returns on behalf of the trust beneficiaries. The interested parties shall give the independent trustee a power of attorney to prepare and file, on their behalf, the personal income tax returns and similar tax documents which may contain information relating to the trust. Appropriate Internal Revenue Service power of attorney

forms shall be used for this purpose. The beneficiaries must transmit to the trustee materials concerning taxable transactions and occurrences outside of the trust, pursuant to the requirements in each trust instrument which detail this procedure. This communication must be approved in advance by the Director in accordance with paragraph (a) of this section.

(iii) Some qualified trust beneficiaries may pay estimated income taxes.

(A) In order to pay the proper amount of estimated taxes each quarter, the beneficiaries of a qualified blind trust will need to receive information about the amount of income, if any, generated by the trust each quarter. To assist the beneficiaries, the independent trustee is permitted to send, on a quarterly basis, information about the amount of income generated by the trust in that quarter. This communication must be approved in advance by the Director in accordance with paragraph (a) of this section.

(B) In order to pay the proper amount of estimated taxes each quarter, the independent trustee of a qualified diversified trust will need to receive information about the amount of income, if any, earned by the beneficiaries on assets that are not in the trust. To assist the independent trustee, the beneficiaries are permitted to send, on a quarterly basis, information about the amount of income they earned in that quarter on assets that are outside of the trust. This communication must be approved in advance by the Director in accordance with paragraph (a) of this section.

(d) *Responsibilities of the independent trustee and other fiduciaries.* (1) Any independent trustee or any other designated fiduciary of a qualified trust shall not knowingly and willfully, or negligently:

(i) Disclose any information to an interested party or that party's representative with respect to the trust that may not be disclosed under title I of the Act, the implementing regulations or the trust instrument;

(ii) Acquire any holding:

(A) Directly from an interested party or that party's representative without

the prior written approval of the Director; or

(B) The ownership of which is prohibited by, or not in accordance with, title I of the Act, the implementing regulations, the trust instrument, or with other applicable statutes and regulations;

(iii) Solicit advice from any interested party or any representative of that party with respect to such trust, which solicitation is prohibited by title I of the Act, the implementing regulations, or the trust instrument; or

(iv) Fail to file any document required by the implementing regulations or the trust instrument.

(2) The independent trustee and any other designated fiduciary, in the exercise of their authority and discretion to manage and control the assets of the trust, shall not consult or notify any interested party or that party's representative.

(3) The independent trustee shall not acquire by purchase, grant, gift, exercise of option, or otherwise, without the prior written approval of the Director, securities, cash, or other property from any interested party or any representative of an interested party.

(4) *Certificate of Compliance.* An independent trustee and any other designated fiduciary shall file, with the Director by May 15th following any calendar year during which the trust was in existence, a properly executed Certificate of Compliance in the form prescribed in appendix B to this part. In addition, the independent trustee and such fiduciary shall maintain and make available for inspection by the Office of Government Ethics, as it may from time to time direct, the trust's books of account and other records and copies of the trust's tax returns for each taxable year of the trust.

(e) *Responsibilities of the interested parties and their representatives.* (1) Interested parties to a qualified trust and their representatives shall not knowingly and willfully, or negligently:

(i) Solicit or receive any information about the trust that may not be disclosed under title I of the Act, the implementing regulations or the trust instrument; or

(ii) Fail to file any document required by this subpart or the trust instrument.

(2) The interested parties and their representatives shall not take any action to obtain, and shall take reasonable action to avoid receiving, information with respect to the holdings and the sources of income of the trust, including a copy of any trust tax return filed by the independent trustee, or any information relating to that return, except for the reports and information specified in paragraphs (b) and (c) of this section.

(3) In the case of any qualified trust, the interested party shall, within thirty days of transferring an asset, other than cash, to a previously established qualified trust, file a report with the Director, which identifies each asset, categorized as to value in accordance with § 2634.301(d).

(4) Any portfolio asset transferred to the trust by an interested party shall be free of any restriction with respect to its transfer or sale, except as fully described in schedules attached to the trust instrument, and as approved by the Director.

(5) During the term of the trust, the interested parties shall not pledge, mortgage, or otherwise encumber their interests in the property held by the trust.

(f) *Amendment of the trust.* The independent trustee and the interested parties may amend the terms of a qualified trust only with the prior written approval of the Director and upon a showing of necessity and appropriateness.

#### § 2634.409 Pre-existing trusts.

An interested party may place a pre-existing irrevocable trust into a qualified trust, which may then be certified by the Office of Government Ethics. This arrangement should be considered in the case of a pre-existing trust whose terms do not permit amendments that are necessary to satisfy the rules of this subpart. All of the relevant parties (including the employee, any other interested parties, the trustee of the pre-existing trust, and all of the other parties and beneficiaries of the pre-existing trust) will be required pursuant to section 102(f)(7) of the Act

## § 2634.410

to enter into an umbrella trust agreement. The umbrella trust agreement will specify that the pre-existing trust will be administered in accordance with the provisions of this subpart. A parent or guardian may execute the umbrella trust agreement on behalf of a required participant who is a minor child. The Office of Government Ethics has prepared model umbrella trust agreements that the employee can use in this circumstance. The umbrella trust agreement will be certified as a qualified trust if all of the requirements of this subpart are fulfilled under conditions where required confidentiality with respect to the trust can be assured.

### § 2634.410 Dissolution.

Within thirty days of dissolution of a qualified trust, the interested party shall file a report of the dissolution with the Director and a list of assets of the trust at the time of the dissolution, categorized as to value in accordance with § 2634.301(d).

### § 2634.411 Reporting on financial disclosure reports.

An employee who files a public or confidential financial disclosure report shall report the trust on the financial disclosure report.

(a) *Public financial disclosure report.* If the employee files a public financial disclosure report, the employee shall report the trust as an asset, including the overall category of value of the trust. Additionally, in the case of a qualified blind trust, the employee shall disclose the category of value of income earned by the trust. In the case of a qualified diversified trust, the employee shall report the category of value of income received from the trust by the employee, the employee's spouse, or dependent child, or applied for the benefit of any of them.

(b) *Confidential financial disclosure report.* In the case of a confidential financial disclosure report, the employee shall report the trust as an asset.

### § 2634.412 Sanctions and enforcement.

Section 2634.702 sets forth civil sanctions, as provided by sections 102(f)(6)(C)(i) and (ii) of the Act and as adjusted in accordance with the Fed-

## 5 CFR Ch. XVI (1–1–16 Edition)

eral Civil Penalties Inflation Adjustment Act, which apply to any interested party, independent trustee, or other trust fiduciary who violates his obligations under the Act, its implementing regulations, or the trust instrument. Subpart E of this part delineates the procedure which must be followed with respect to the revocation of trust certificates and trustee approvals.

### § 2634.413 Public access.

(a) *Documents subject to public disclosure requirements.* The following qualified trust documents filed by a public filer, nominee, or candidate are subject to the public disclosure requirements of § 2634.603:

(1) The executed trust instrument and any amendments (other than those provisions which relate to the testamentary disposition of the trust assets), and a list of the assets which were transferred to the trust, categorized as to the value of each asset;

(2) The identity of each additional asset (other than cash) transferred to a qualified trust by an interested party during the life of the trust, categorized as to the value of each asset;

(3) The report of the dissolution of the trust and a list of the assets of the trust at the time of the dissolution, categorized as to the value of each asset;

(4) In the case of a blind trust, the lists provided by the independent trustee of assets placed in the trust by an interested party which have been sold; and

(5) The Certificates of Independence and Compliance.

(b) *Documents exempt from public disclosure requirements.* The following documents are exempt from the public disclosure requirements of § 2634.603 and also shall not be disclosed to any interested party:

(1) Any document (and the information contained therein) filed under the requirements of § 2634.408(a) and (c); and

(2) Any document (and the information contained therein) inspected under the requirements of § 2634.408(d)(4) (other than a Certificate of Compliance).

**§ 2634.414 OMB control number.**

The various model trust documents and Certificates of Independence and Compliance referenced in this subpart, together with the underlying regulatory provisions (and appendices A, B and C to this part for the Certificates), are all approved by the Office of Management and Budget under control number 3209-0007.

**Subpart E—Revocation of Trust Certificates and Trustee Approvals**

SOURCE: 77 FR 391440, July 2, 2012, unless otherwise noted.

**§ 2634.501 Purpose and scope.**

(a) *Purpose.* This subpart establishes the procedures of the Office of Government Ethics for enforcement of the qualified blind trust, qualified diversified trust, and independent trustee provisions of title I of the Ethics in Government Act of 1978, as amended, and the regulation issued thereunder (subpart D of this part).

(b) *Scope.* This subpart applies to all trustee approvals and trust certifications pursuant to §§ 2634.405 and 2634.407, respectively.

**§ 2634.502 Definitions.**

For purposes of this subpart (unless otherwise indicated), the term “trust restrictions” means the applicable provisions of title I of the Ethics in Government Act of 1978, subpart D of this part, and the trust instrument.

**§ 2634.503 Determinations.**

(a) *Violations.* If the Office of Government Ethics learns that violations or apparent violations of the trust restrictions exist that may warrant revocations of trust certification or trustee approval previously granted under § 2634.407 or § 2634.405, the Director may, pursuant to the procedure specified in paragraph (b) of this section, appoint an attorney on the staff of the Office of Government Ethics to review the matter. After completing the review, the attorney will submit findings and recommendations to the Director.

(b) *Review procedure.* (1) In the review of the matter, the attorney shall perform such examination and analysis of

violations or apparent violations as the attorney deems reasonable.

(2) The attorney shall provide an independent trustee and, if appropriate, the interested parties, with:

(i) Notice that revocation of trust certification or trustee approval is under consideration pursuant to the procedures in this subpart;

(ii) A summary of the violation or apparent violations that shall state the preliminary facts and circumstances of the transactions or occurrences involved with sufficient particularity to permit the recipients to determine the nature of the allegations; and

(iii) Notice that the recipients may present evidence and submit statements on any matter in issue within ten business days of the recipient’s actual receipt of the notice and summary.

(c) *Determination.* (1) In making determinations with respect to the violations or apparent violations under this section, the Director shall consider the findings and recommendations submitted by the attorney, as well as any written statements submitted by the independent trustee or interested parties.

(2) The Director may take one of the following actions upon finding a violation or violations of the trust restrictions:

(i) Issue an order revoking trust certification or trustee approval;

(ii) Resolve the matter through any other remedial action within the Director’s authority;

(iii) Order further examination and analysis of the violation or apparent violation; or

(iv) Decline to take further action.

(3) If the Director issues an order of revocation, parties to the trust instrument will receive prompt written notification. The notice shall state the basis for the revocation and shall inform the parties of the consequence of the revocation, which will be either of the following:

(i) The trust is no longer a qualified blind or qualified diversified trust for any purpose under Federal law; or

(ii) The independent trustee may no longer serve the trust in any capacity and must be replaced by a successor,

## § 2634.601

who is subject to the prior written approval of the Director.

### Subpart F—Procedure

SOURCE: 57 FR 11821, Apr. 7, 1992, unless otherwise noted.

#### § 2634.601 Report forms.

(a) The Office of Government Ethics provides, through the Federal Supply Service of the General Services Administration (GSA), a standard form, the SF 278 (Public Financial Disclosure Report), for reporting the information described in subpart B of this part on executive branch public disclosure. The Office of Government Ethics also provides two uniform formats relating to confidential financial disclosure: OGE Form 450 (Confidential Financial Disclosure Report) for reporting the information described in subpart I of this part on executive branch confidential disclosure; and OGE Optional Form 450-A (Confidential Certificate of No New Interests) for voluntary use by certain employees in lieu of filing an annual OGE Form 450, if authorized by their agency, in accordance with § 2634.905(b) of subpart I of this part. Supplies of the two confidential forms are to be reproduced locally by each agency, from a camera-ready copy or an electronic format made available by the Office of Government Ethics.

(b) Subject to the prior written approval of the Director of the Office of Government Ethics, an agency may require employees to file additional confidential financial disclosure forms which supplement either or both of the standard forms referred to in paragraph (a) of this section, if necessary because of special or unique agency circumstances. The Director may approve such agency forms when, in his opinion, the supplementation is shown to be necessary for a comprehensive and effective agency ethics program to identify and resolve conflicts of interest. See §§ 2634.103 and 2634.901.

(c) The information collection and recordkeeping requirements have been approved by the Office of Management and Budget under control number 3209-0001 for the SF 278, and control number 3209-0006 for OGE Form 450/SF 450. OGE Optional Form 450-A has been deter-

## 5 CFR Ch. XVI (1-1-16 Edition)

mined not to require an OMB paper-work control number, as its use is strictly optional for employees, it is used exclusively by current Government employees, and it does not require affirmative disclosure of substantive information.

[57 FR 11821, Apr. 7, 1992, as amended at 58 FR 38912, July 21, 1993; 59 FR 34756, July 7, 1994; 62 FR 33976, June 24, 1997; 63 FR 43068, Aug. 12, 1998; 71 FR 28234, May 16, 2006]

#### § 2634.602 Filing of reports.

(a) Except as otherwise provided in this section, the reporting individual shall file financial disclosure reports required under this part with the designated agency ethics official or his delegate at the agency where the individual is employed, or was employed immediately prior to termination of employment, or in which he will serve. Detailees shall file with their primary agency. Reports are due at the times indicated in § 2634.201 of subpart B (public disclosure) or § 2634.903 of subpart I (confidential disclosure) of this part, unless an extension is granted pursuant to the provisions of subparts B or I of this part.

(b) The President, the Vice President, any independent counsel, and persons appointed by independent counsel under 28 U.S.C. chapter 40, shall file the public financial disclosure reports required under this part with the Director of the Office of Government Ethics.

(c)(1) Each agency receiving the public financial disclosure reports required to be filed under this part by the following individuals shall transmit copies to the Director of the Office of Government Ethics:

- (i) The Postmaster General;
- (ii) The Deputy Postmaster General;
- (iii) The Governors of the Board of Governors of the United States Postal Service;
- (iv) The designated agency ethics official;
- (v) Employees of the Executive Office of the President who are appointed under 3 U.S.C. 105(a)(2)(A) or (B) or 3 U.S.C. 107(a)(1)(A) or (b)(1)(A)(i), and employees of the Office of Vice President who are appointed under 3 U.S.C. 106(a)(1)(A) or (B); and



(vi) Officers and employees in, and nominees to, offices or positions which require confirmation by the Senate, other than members of the uniformed services.

(2) Prior to transmitting a copy of a report to the Director of the Office of Government Ethics, the designated agency ethics official or his delegate shall review that report in accordance with § 2634.605 of this subpart, except for his own report, which shall be reviewed by the agency head or by a delegate of the agency head.

(3) For nominee reports, the Director of the Office of Government Ethics shall forward a copy to the Senate committee that is considering the nomination. (See § 2634.605(c) of this subpart for special procedures regarding the review of such reports.)

(d) The Director of the Office of Government Ethics shall file his financial disclosure report with his Office, which shall make it immediately available to the public in accordance with this part.

(e) Candidates for President and Vice President identified in § 2634.201(d), other than an incumbent President or Vice President, shall file their financial disclosure reports with the Federal Election Commission, which shall review and send copies of such reports to the Director of the Office of Government Ethics.

(f) Members of the uniformed services identified in § 2634.202(c) shall file their financial disclosure reports with the Secretary concerned, or his delegate.

**§ 2634.603 Custody of and access to public reports.**

(a) Each agency shall make available to the public in accordance with the provisions of this section those public reports filed with the agency by reporting individuals described under subpart B of this part.

(b) This section does not require public availability of those reports filed by:

(1) Any individual in the Central Intelligence Agency, the Defense Intelligence Agency, or the National Security Agency, or any individual engaged in intelligence activities in any agency of the United States, if the President finds or has found that, due to the nature of the office or position occupied

by that individual, public disclosure of the report would, by revealing the identity of the individual or other sensitive information, compromise the national interest of the United States. Individuals referred to in this paragraph who are exempt from the public availability requirement may also be authorized, notwithstanding § 2634.701, to file any additional reports necessary to protect their identity from public disclosure, if the President finds or has found that such filings are necessary in the national interest; or

(2) An independent counsel whose identity has not been disclosed by the Court under 28 U.S.C chapter 40, or any person appointed by that independent counsel under such chapter.

(c) Each agency shall, within thirty days after any public report is received by the agency, permit inspection of the report by, or furnish a copy of the report to, any person who makes written application as provided by agency procedure. Agency reviewing officials and the support staffs who maintain the files, the staff of the Office of Government Ethics, and Special Agents of the Federal Bureau of Investigation who are conducting a criminal inquiry into possible conflict of interest violations need not submit an application. The agency may utilize Office of Government Ethics Form 201 for such applications. An application shall state:

(1) The requesting person's name, occupation, and address;

(2) The name and address of any other person or organization on whose behalf the inspection or copy is requested; and

(3) That the requesting person is aware of the prohibitions on obtaining or using the report set forth in paragraph (f) of this section.

(d) Applications for the inspection of or copies of public reports shall also be made available to the public throughout the period during which the report itself is made available, utilizing the procedures in paragraph (c) of this section.

(e) The agency may require a reasonable fee, established by agency regulation, to recover the direct cost of reproduction or mailing of a public report, excluding the salary of any employee involved. A copy of the report

may be furnished without charge or at a reduced charge if the agency determines that waiver or reduction of the fee is in the public interest. The criteria used by an agency to determine when a fee will be reduced or waived shall be established by regulation. Agency regulations contemplated by paragraph (e) of this section do not require approval pursuant to §2634.103.

(f) It is unlawful for any person to obtain or use a public report:

- (1) For any unlawful purpose;
- (2) For any commercial purpose, other than by news and communications media for dissemination to the general public;
- (3) For determining or establishing the credit rating of any individual; or
- (4) For use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.

*Example 1.* The deputy general counsel of Agency X is responsible for reviewing the public financial disclosure reports filed by persons within that agency. The agency personnel director, who does not exercise functions within the ethics program, wishes to review the disclosure report of an individual within the agency. The personnel director must file an application to review the report. However, the supervisor of an official with whom the deputy general counsel consults concerning matters arising in the review process need not file such an application.

*Example 2.* A state law enforcement agent is conducting an investigation which involves the private financial dealings of an individual who has filed a public financial disclosure report. The agent must complete a written application in order to inspect or obtain a copy.

*Example 3.* A financial institution has received an application for a loan from an official which indicates her present financial status. The official has filed a public financial disclosure statement with her agency. The financial institution cannot be given access to the disclosure form for purposes of verifying the information contained on the application.

(g)(1) Any public report filed with an agency or transmitted to the Director of the Office of Government Ethics under this section shall be retained by the agency, and by the Office of Government Ethics when it receives a copy. The report shall be made available to the public for a period of six years after receipt. After the six-year period, the report shall be destroyed unless needed in an ongoing investiga-

tion, except that in the case of an individual who filed the report pursuant to §2634.201(c) as a nominee and was not subsequently confirmed by the Senate, or who filed the report pursuant to §2634.201(d) as a candidate and was not subsequently elected, the report, unless needed in an ongoing investigation, shall be destroyed one year after the individual either is no longer under consideration by the Senate or is no longer a candidate for nomination or election to the Office of President or Vice President. See also the OGE/GOVT-1 Governmentwide executive branch Privacy Act system of records (available for inspection at the Office of Government Ethics), as well as any applicable agency system of records.

(2) For purposes of paragraph (g)(1) of this section, in the case of a reporting individual with respect to whom a trust has been certified under subpart D of this part, a copy of the qualified trust agreement, the list of assets initially placed in the trust, and all other publicly available documents relating to the trust shall be retained and made available to the public until the periods for retention of all other reports of the individual have lapsed under paragraph (g)(1) of this section.

(Approved by the Office of Management and Budget under control numbers 3209-0001 and 3209-0002)

[57 FR 11821, Apr. 7, 1992; 57 FR 21854, May 22, 1992, as amended at 59 FR 34756, July 7, 1994]

**§2634.604 Custody of and denial of public access to confidential reports.**

(a) Any report filed with an agency under subpart I of this part shall be retained by the agency for a period of six years after receipt. After the six-year period, the report shall be destroyed unless needed in an ongoing investigation. See also the OGE/GOVT-2 Governmentwide executive branch Privacy Act system of records (available for inspection at the Office of Government Ethics), as well as any applicable agency system of records.

(b) The reports filed pursuant to subpart I of this part are confidential. No member of the public shall have access to such reports, except pursuant to the order of a Federal court or as otherwise provided under the Privacy Act. See 5

U.S.C. 552a and the OGE/GOVT-2 Privacy Act system of records (and any applicable agency system); 5 U.S.C. app. (Ethics in Government Act of 1978, section 107(a)); sections 201(d) and 502(b) of Executive Order 12674, as modified by Executive Order 12731; and § 2634.901(d).

[57 FR 11821, Apr. 7, 1992; 57 FR 21854, May 22, 1992]

#### § 2634.605 Review of reports.

(a) *In general.* The designated agency ethics official shall normally serve as the reviewing official for reports submitted to his agency. That responsibility may be delegated, except in the case of certification of nominee reports required by paragraph (c) of this section. See also § 2634.105(q). He shall note on any report or supplemental report the date on which it is received. Except as indicated in paragraph (c) of this section, all reports shall be reviewed within 60 days after the date of filing. Reports reviewed by the Director of the Office of Government Ethics shall be reviewed within 60 days from the date on which they are received by that Office. Final certification in accordance with paragraph (b)(2) of this section may, of necessity, occur later, where additional information is being sought or remedial action is being taken under this section.

(b) *Responsibilities of reviewing officials*—(1) *Initial review.* The reviewing official may request an intermediate review by the filer's supervisor. In the case of a filer who is detailed to another agency for more than 60 days during the reporting period, the reviewing official shall obtain an intermediate review by the agency where the filer served as a detailee. After obtaining any intermediate review or determining that such review is not required, the reviewing official shall examine the report to determine, to his satisfaction that:

(i) Each required item is completed; and

(ii) No interest or position disclosed on the form violates or appears to violate:

(A) Any applicable provision of chapter 11 of title 18, United States Code;

(B) The Act, as amended, and the implementing regulations;

(C) Executive Order 12674, as modified by Executive Order 12731, and the implementing regulations; or

(D) Any other agency-specific statute or regulation which governs the filer.

(2) *Signature by reviewing official.* If the reviewing official determines that the report meets the requirements of paragraph (b)(1) of this section, he shall certify it by signature and date. The reviewing official need not audit the report to ascertain whether the disclosures are correct. Disclosures shall be taken at "face value" as correct, unless there is a patent omission or ambiguity or the official has independent knowledge of matters outside the report. However, a report which is signed by a reviewing official certifies that the filer's agency has reviewed the report, and that the reviewing official has concluded that each required item has been completed and that on the basis of information contained in such report the filer is in compliance with applicable laws and regulations noted in paragraph (b)(1)(ii) of this section.

(3) *Requests for, and review based on, additional information.* If the reviewing official believes that additional information is required, he shall request that it be submitted by a specified date. This additional information shall be made a part of the report. If the reviewing official concludes, on the basis of the information disclosed in the report and any additional information submitted, that the report fulfills the requirements of paragraph (b)(1) of this section, the reviewing official shall sign and date the report.

(4) *Compliance with applicable laws and regulations.* If the reviewing official concludes that information disclosed in the report may reveal a violation of applicable laws and regulations as specified in paragraph (b)(1)(ii) of this section, the official shall:

(i) Notify the filer of that conclusion;

(ii) Afford the filer a reasonable opportunity for an oral or written response; and

(iii) Determine, after considering any response, whether or not the filer is then in compliance with applicable laws and regulations specified in paragraph (b)(1)(ii) of this section. If the reviewing official concludes that the report does fulfill the requirements, he

shall sign and date the report. If he determines that it does not, he shall:

(A) Notify the filer of the conclusion;  
(B) Afford the filer an opportunity for personal consultation if practicable;

(C) Determine what remedial action under paragraph (b)(5) of this section should be taken to bring the report into compliance with the requirements of paragraph (b)(1)(ii) of this section; and

(D) Notify the filer in writing of the remedial action which is needed, and the date by which such action should be taken.

(5) *Remedial action.* (i) Except in unusual circumstances, which must be fully documented to the satisfaction of the reviewing official, remedial action shall be completed not later than three months from the date on which the filer received notice that the action is required.

(ii) Remedial action may include, as appropriate:

(A) Divestiture of a conflicting interest (see subpart J of this part);

(B) Resignation from a position with a non-Federal business or other entity;

(C) Restitution;

(D) Establishment of a qualified blind or diversified trust under the Act and subpart D of this part;

(E) Procurement of a waiver under 18 U.S.C. 208(b)(1) or (b)(3);

(F) Preparation of a written instrument of recusal (disqualification); or

(G) Voluntary request by the filer for transfer, reassignment, limitation of duties, or resignation.

(6) *Compliance or referral.* (i) If the filer complies with a written request for remedial action under paragraph (b)(4) of this section, the reviewing official shall indicate, in the comment section of the report, what remedial action has been taken. The official shall also sign and date the report.

(ii) If the filer does not comply by the designated date with the written request for remedial action transmitted under paragraph (b)(4) of this section, the reviewing official shall, in the case of a public filer under subpart B of this part, notify the head of the agency and the Office of Government Ethics, for appropriate action. Where the filer is in a position in the executive branch

(other than in the uniformed services or the Foreign Service), appointment to which requires the advice and consent of the Senate, the Director of the Office of Government Ethics shall refer the matter to the President. In the case of the Postmaster General or Deputy Postmaster General, the Director of the Office of Government Ethics shall recommend to the Governors of the Board of Governors of the United States Postal Service the action to be taken. For confidential filers, the reviewing official will follow agency procedures.

(c) *Expedited procedure in the case of individuals appointed by the President and subject to confirmation by the Senate.* In the case of a report filed by an individual described in § 2634.201(c) who is nominated by the President for appointment to a position that requires the advice and consent of the Senate:

(1) The Executive Office of the President shall furnish the applicable financial disclosure report form to the nominee. It shall forward the completed report to the designated agency ethics official at the agency where the nominee is serving or will serve, or it may direct the nominee to file the completed report directly with the designated agency ethics official.

(2) The designated agency ethics official shall complete an accelerated review of the report, in accordance with the standards and procedures in paragraph (b) of this section. If that official concludes that the report reveals no conflict of interest under applicable laws and regulations, the official shall:

(i) Attach to the report a description (when available) of the position to be filled by the nominee;

(ii) Personally certify the report by signature, and date the certification;

(iii) Write an opinion letter to the Director of the Office of Government Ethics, personally certifying that there is no unresolved conflict of interest under applicable laws and regulations, and discussing:

(A) Any actual or apparent conflicts of interest that were detected during the review process; and

(B) The resolution of those real or apparent conflicts, including any specific commitment, ethics agreement entered under the provisions of subpart H of

## Office of Government Ethics

## § 2634.607

this part, or other undertaking by the nominee to resolve any such conflicts. A copy of any commitment, agreement, or other undertaking which is reduced to writing shall be sent to the Director, in accordance with subpart H of this part; and

(iv) Deliver the letter and the report to the Director of the Office of Government Ethics, within three working days after the designated agency ethics official receives the report.

NOTE: The designated agency ethics official's certification responsibilities in § 2634.605(c) are nondelegable and must be accomplished by him personally, or by the agency's alternate designated agency ethics official, in his absence. See § 2638.203 of this chapter.

(3) The Director of the Office of Government Ethics shall review the report and the letter from the designated agency ethics official. If the Director is satisfied that no unresolved conflicts of interest exist, then the Director shall sign and date the report form. The Director shall then submit the report with a letter to the appropriate Senate committee, expressing the Director's opinion whether, on the basis of information contained in the report, the nominee has complied with all applicable conflict laws and regulations.

(4) If, in the case of any nominee or class of nominees, the expedited procedure specified in this paragraph cannot be completed within the time set forth in paragraph (c)(2)(iv) of this section, the designated agency ethics official shall inform the Director. When necessary and appropriate, the Director may modify the rule of that paragraph for a nominee or a class of nominees with respect to a particular department or agency.

### § 2634.606 Updated disclosure of advice-and-consent nominees.

(a) *General rule.* Each individual described in § 2634.201(c) who is nominated by the President for appointment to a position that requires advice and consent of the Senate, shall, at or before the commencement of the first Senate committee hearing to consider the nomination, submit to the committee an amendment to the report previously filed under § 2634.201(c) and transmit copies of the amendment to the des-

ignated agency ethics official referred to in § 2634.605(c)(1) of this subpart and to the Office of Government Ethics, which shall update, through the period ending no more than five days prior to the commencement of the hearing, the disclosure of information required with respect to receipt of:

(1) Outside earned income; and

(2) Honoraria, as defined in § 2634.105(i).

(b) *Additional certification.* In each case to which this section applies, the Director of the Office of Government Ethics shall, at the request of the committee considering the nomination, submit to the committee an opinion letter of the nature described in § 2634.605(c)(3) of this subpart concerning the updated disclosure. If the committee requests such a letter, the expedited procedure provided by § 2634.605(c) of this subpart shall govern review of the updated disclosure, which shall be deemed a report filed for purposes of that paragraph.

### § 2634.607 Advice and opinions.

To assist employees in avoiding situations in which they might violate applicable financial disclosure laws and regulations:

(a) The Director of the Office of Government Ethics shall render formal advisory opinions and informal advisory letters on generally applicable matters, or on important matters of first impression. See also subpart C of part 2638 of this chapter. The Director shall insure that these advisory opinions and letters are compiled, published, and made available to agency ethics officials and the public. Good faith reliance on such opinions shall provide a defense to any penalty or sanction provided by this part for fact situations indistinguishable in all material aspects from those in the opinion.

(b) Designated agency ethics officials will offer advice and guidance to employees as needed, to assist them in complying with the requirements of the Act and this part on financial disclosure.

## Subpart G—Penalties

SOURCE: 57 FR 11824, Apr. 7, 1992, unless otherwise noted.

## § 2634.701

### § 2634.701 Failure to file or falsifying reports.

(a) *Referral of cases.* The head of each agency, each Secretary concerned, or the Director of the Office of Government Ethics, as appropriate, shall refer to the Attorney General the name of any individual when there is reasonable cause to believe that such individual has willfully failed to file a public report or information required on such report, or has willfully falsified any information (public or confidential) required to be reported under this part.

(b) *Civil action.* The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully falsifies or who knowingly and willfully fails to file or report any information required by filers of public reports under subpart B of this part. The court in which the action is brought may assess against the individual a civil monetary penalty in any amount, not to exceed \$10,000, as provided by section 104(a) of the Act, for any such violation occurring before September 29, 1999, as adjusted effective September 29, 1999 to \$11,000 for any such violation occurring on or after that date, in accordance with the inflation adjustment procedures prescribed in the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended.

(c) *Criminal action.* An individual may also be prosecuted under criminal statutes for supplying false information on any financial disclosure report.

(d) *Administrative remedies.* The President, the Vice President, the Director of the Office of Government Ethics, the Secretary concerned, the head of each agency, and the Office of Personnel Management may take appropriate personnel or other action in accordance with applicable law or regulation against any individual for failing to file public or confidential reports required by this part, for filing such reports late, or for falsifying or failing to report required information. This may include adverse action under 5 CFR part 752, if applicable.

[57 FR 11824, Apr. 7, 1992, as amended at 64 FR 47096, Aug. 30, 1999]

## 5 CFR Ch. XVI (1–1–16 Edition)

### § 2634.702 Breaches by trust fiduciaries and interested parties.

(a) The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully violates the provisions of § 2634.408(d)(1) or (e)(1) of this part. The court in which the action is brought may assess against the individual a civil monetary penalty in any amount, not to exceed \$10,000, as provided by section 102(f)(6)(C)(i) of the Act, for such violation occurring before September 29, 1999, as adjusted effective September 29, 1999 to \$11,000 for any such violation occurring on or after that date, in accordance with the inflation adjustment procedures prescribed in the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended.

(b) The Attorney General may bring a civil action in any appropriate United States district court against any individual who negligently violates the provisions of § 2634.408(d)(1) or (e)(1). The court in which the action is brought may assess against the individual a civil monetary penalty in any amount, not to exceed \$5,000, as provided by section 102(f)(6)(C)(ii) of the Act, for any such violation occurring before September 29, 1999, as adjusted effective September 29, 1999 to \$5,500 for any such violation occurring on or after that date, in accordance with the inflation adjustment procedures prescribed in the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended.

[57 FR 11824, Apr. 7, 1992, as amended at 64 FR 47097, Aug. 30, 1999; 77 FR 39150, July 2, 2012]

### § 2634.703 Misuse of public reports.

The Attorney General may bring a civil action against any person who obtains or uses a report filed under this part for any purpose prohibited by section 105(c)(1) of the Act, as incorporated in § 2634.603(f). The court in which the action is brought may assess against the person a civil monetary penalty in any amount, not to exceed \$10,000, as provided by section 105(c)(2) of the Act, for any such violation occurring before September 29, 1999, as adjusted effective September 29, 1999 to \$11,000 for any such violation occurring

on or after that date, in accordance with the inflation adjustment procedures prescribed in the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended. This remedy shall be in addition to any other remedy available under statutory or common law.

[57 FR 11824, Apr. 7, 1992, as amended at 64 FR 47097, Aug. 30, 1999]

#### § 2634.704 Late filing fee.

(a) *In general.* In accordance with section 104(d) of the Act, any reporting individual who is required to file a public financial disclosure report by the provisions of this part shall remit a late filing fee of \$200 to the appropriate agency, payable to the U.S. Treasury, if such report is filed more than thirty days after the later of:

(1) The date such report is required to be filed pursuant to the provisions of this part; or

(2) The last day of any filing extension period granted pursuant to § 2634.201(f).

(b) *Exceptions.* (1) The designated agency ethics official may waive the late filing fee if he determines that the delay in filing was caused by extraordinary circumstances, including the agency's failure to notify a new entrant, first-time annual filer, or termination filer of the requirement to file the public financial disclosure report, which made the delay reasonably necessary.

(2) Employees requesting a waiver of the late filing fee from the designated agency ethics official must request the waiver in writing with supporting documentation. The designated agency ethics official's determination must be made in writing to the employee with a copy placed in the employee's public financial disclosure report file. The designated agency ethics official may consult with the Office of Government Ethics prior to approving any waiver of the late filing fee.

(c) *Procedure.* (1) The designated agency ethics official shall maintain a record of the due dates for all public reports which the employees of that agency must file, along with the new filing dates under extensions which have been granted. Each report received by the agency shall be marked with the date of receipt. For any report

which has not been received by the end of the period specified in paragraph (a) of this section, the agency shall advise the delinquent filer, in writing, that:

(i) Because his financial disclosure report is more than thirty days overdue, a \$200 late filing fee will become due at the time of filing, by reason of section 104(d) of the Act and § 2634.704;

(ii) The filer is directed to remit to the agency, with the completed report, the \$200 fee, payable to the United States Treasury;

(iii) If the filer fails to remit the \$200 fee when filing his late report, it shall be subject to agency debt collection procedures; and

(iv) If extraordinary circumstances exist that would justify a request for a fee waiver, pursuant to paragraph (b) of this section, such request and supporting documentation must be submitted immediately.

(2) Upon receipt from the reporting individual of the \$200 late filing fee, the collecting agency shall note the payment in its records, and shall then forward the money to the U.S. Treasury for deposit as miscellaneous receipts, in accordance with 31 U.S.C. 3302 and section 8030.30 of Volume 1 of the Treasury Financial Manual. If payment is not forthcoming, agency debt collection procedures shall be utilized, which may include salary or administrative offset, initiation of a tax refund offset, or other authorized action.

(d) *Late filing fee not exclusive remedy.* The late filing fee is in addition to other sanctions which may be imposed for late filing. See § 2634.701 of this subpart.

(e) *Confidential filers.* The late filing fee does not apply to confidential filers. Late filing of confidential reports will be handled administratively under § 2634.701(d) of this subpart.

(f) *Date of filing.* The date of filing for purposes of determining whether a public financial disclosure report is filed more than thirty days late under this section will be the date of receipt by the agency, which should be noted on the report in accordance with § 2634.605(a). The thirty-day grace period on imposing a late filing fee is adequate allowance for administrative

## § 2634.801

delays in the receipt of reports by an agency.

[57 FR 11824, Apr. 7, 1992, as amended at 58 FR 38912, July 21, 1993; 67 FR 49857, Aug. 1, 2002]

### Subpart H—Ethics Agreements

SOURCE: 57 FR 11825, Apr. 7, 1992, unless otherwise noted.

#### § 2634.801 Scope.

This subpart applies to ethics agreements made by any reporting individual under either subpart B or I of this part, to resolve potential or actual conflicts of interest.

#### § 2634.802 Requirements.

(a) *Ethics agreement defined.* The term *ethics agreement* shall include, for the purposes of this subpart, any oral or written promise by a reporting individual to undertake specific actions in order to alleviate an actual or apparent conflict of interest, such as:

- (1) Preparation of a written instrument for recusing (disqualifying) the individual from one or more particular matters or categories of official action;
- (2) Divestiture of a financial interest;
- (3) Resignation from a position with a non-Federal business or other entity;
- (4) Procurement of a waiver pursuant to 18 U.S.C. 208(b)(1) or (b)(3); or
- (5) Establishment of a qualified blind or diversified trust under the Act and subpart D of this part.

(b) *Time limit.* The ethics agreement shall specify that the individual must complete the action which he or she has agreed to undertake within a period not to exceed three months from the date of the agreement (or of Senate confirmation, if applicable). Exceptions to the three-month deadline can be made in cases of unusual hardship, as determined by the Office of Government Ethics, for those ethics agreements which are submitted to it (see § 2634.803 (a), (b), or (c) of this subpart), or by the designated agency ethics official for all other ethics agreements.

*Example:* An official of the ABC Aircraft Company is nominated to a Department of Defense position requiring the advice and consent of the Senate. As a condition of assuming the position, the individual has agreed to divest himself of his ABC Aircraft

## 5 CFR Ch. XVI (1–1–16 Edition)

stock which he recently acquired while he was an officer with the company. However, the Securities and Exchange Commission prohibits officers of public corporations from deriving a profit from the sale of stock in the corporation in which they hold office within six months of acquiring the stock, and directs that any such profit must be returned to the issuing corporation or its stockholders. Since meeting the usual three-month time limit specified in this subpart for satisfying an ethics agreement might entail losing any profit that could be realized on the sale of this stock, the nominee requests that the limit be extended beyond the six-month period imposed by the Commission. Written approval would have to be obtained from the Office of Government Ethics to extend the customary three-month period.

#### § 2634.803 Notification of ethics agreements.

(a) *Nominees to positions requiring the advice and consent of the Senate.* (1) In the case of a nominee referred to in § 2634.201(c), the designated agency ethics official shall include with the report submitted to the Office of Government Ethics any ethics agreement which the nominee has made.

(2) A designated agency ethics official shall immediately notify the Office of Government Ethics of any ethics agreement of a nominee which is made or becomes known to the designated agency ethics official after the submission of the nominee's report to the Office of Government Ethics. This requirement includes an ethics agreement made between a nominee and the Senate confirmation committee. The nominee shall immediately report to the designated agency ethics official any ethics agreement made with the committee.

(3) The Office of Government Ethics shall immediately apprise the designated agency ethics official and the Senate confirmation committee of any ethics agreements made directly between the nominee and the Office of Government Ethics.

(b) *Incumbents in positions requiring the advice and consent of the Senate.* In the case of a position which required the advice and consent of the Senate, the designated agency ethics official shall keep the Office of Government Ethics apprised of any ethics agreements which the incumbent makes, or which become known to the designated



## Office of Government Ethics

## § 2634.804

agency ethics official during the incumbent's term in his position.

(c) *Designated agency ethics officials not holding advice-and-consent positions, and employees of the Offices referred to in § 2634.602(c)(1)(v).* A designated agency ethics official who has entered into an ethics agreement, and who is neither a nominee to, nor an incumbent in, a position which requires the advice and consent of the Senate, as well as each employee of the Executive Office of the President or the Office of the Vice President who is referred to in § 2634.602(c)(1)(v), shall include with his initial financial disclosure report submitted to the Office of Government Ethics any ethics agreement undertaken by such official or employee. He shall also apprise the Office of Government Ethics promptly of any subsequent ethics agreement.

(d) *Other reporting individuals.* Other reporting individuals desiring to enter into an ethics agreement may do so with the designated agency ethics official for the employee's agency. Where an ethics agreement has been made with someone other than the designated agency ethics official, the officer or employee involved shall promptly apprise the designated agency ethics official of the agreement.

[57 FR 11825, Apr. 7, 1992; 57 FR 21855, May 22, 1992, as amended at 73 FR 15388, Mar. 24, 2008]

### § 2634.804 Evidence of compliance.

(a) *Requisite evidence of action taken.*

(1) For ethics agreements of nominees to positions requiring the advice and consent of the Senate, evidence of any action taken to comply with the terms of such ethics agreements shall be submitted by the designated agency ethics official, upon receipt of the evidence, to the Office of Government Ethics and to the Senate confirmation committee.

(2) For ethics agreements of incumbents in positions which required the advice and consent of the Senate, evidence of any action taken to comply with the terms of such ethics agreements shall be submitted promptly by the designated agency ethics official to the Office of Government Ethics. A designated agency ethics official or an employee referred to in § 2634.803(c) of this subpart who is neither a nominee to, nor an incumbent in, an advice-and-

consent position, must also promptly send evidence of any action taken to comply with the terms of an ethics agreement to the Office of Government Ethics.

(3) In the case of all other reporting individuals, evidence of any action taken to comply with the terms of an ethics agreement must be sent promptly to the designated agency ethics official.

(b) The following materials and any other appropriate information constitute evidence of the action taken:

(1) *Recusal.* A copy of any recusal instrument listing and describing the specific matters or subjects to which the recusal applies, a statement of the method by which the agency will enforce the recusal, and a list of the positions of those agency employees involved in the enforcement (*i.e.*, the individual's immediate subordinates and supervisors).

*Example:* A new employee of a Federal safety board owns stock in Nationwide Airlines. She has entered into an ethics agreement to recuse herself from participating in any accident investigations involving that company's aircraft until such time as she can complete a divestiture of the asset. She must give a copy of the recusal instrument to her immediate subordinates and supervisors, and to the designated agency ethics official. The employee has also agreed to recuse herself from any particular matter (as that term is used in 18 U.S.C. 208) that might arise with respect to any of her present or future holdings. There is no requirement to execute a recusal instrument for this type of general recusal, because it is simply a promise to abide by the terms of the statute.

(2) *Divestiture or resignation.* Written notification that the divestiture or resignation has occurred.

(3) *Waivers.* A copy of any waivers issued pursuant to 18 U.S.C. 208(b)(1) or (b)(3) and signed by the appropriate supervisory official.

(4) *Blind or diversified trusts.* Information required by subpart D of this part to be submitted to the Office of Government Ethics for its certification of any qualified trust instrument. If the Office of Government Ethics does not certify the trust, the designated agency ethics official and, as appropriate,

## § 2634.805

the Senate confirmation committee should be informed immediately.

[57 FR 11825, Apr. 7, 1992; 57 FR 21855, May 22, 1992]

### § 2634.805 Retention.

Records of ethics agreements and actions described in this subpart shall be maintained with the individual's financial disclosure report at the agency and additionally, in the case of filers described in paragraphs (a), (b), and (c) of § 2634.803 of this subpart, at the Office of Government Ethics.

[57 FR 11825, Apr. 7, 1992; 57 FR 21855, May 22, 1992]

## Subpart I—Confidential Financial Disclosure Reports

SOURCE: 57 FR 11826, Apr. 7, 1992, unless otherwise noted.

### § 2634.901 Policies of confidential financial disclosure reporting.

(a) The confidential financial reporting system set forth in this subpart is designed to complement the public reporting system established by title I of the Act. High-level officials in the executive branch are required to report certain financial interests publicly to ensure that every citizen can have confidence in the integrity of the Federal Government. It is equally important in order to guarantee the efficient and honest operation of the Government that other, less senior, executive branch employees, whose Government duties involve the exercise of significant discretion in certain sensitive areas, report their financial interests and outside business activities to their employing agencies, to facilitate the review of possible conflicts of interest. These reports assist an agency in administering its ethics program and counseling its employees. Such reports are filed on a confidential basis.

(b) The confidential reporting system seeks from employees only that information which is relevant to the administration and application of criminal conflict of interest laws, administrative standards of conduct, and agency-specific statutory and program-related restrictions. The basic content of the reports required by § 2634.907 of this

## 5 CFR Ch. XVI (1–1–16 Edition)

subpart reflects that certain information is generally relevant to all agencies. However, depending upon an agency's authorized activities and any special or unique circumstances, additional information may be necessary. In these situations, and subject to the prior written approval of the Director of the Office of Government Ethics, agencies may formulate supplemental reporting requirements by following the procedures of §§ 2634.103 and 2634.601(b).

(c) This subpart also allows an agency to request, on a confidential basis, additional information from persons who are already subject to the public reporting requirements of this part. The public reporting requirements of the Act address Governmentwide concerns. The reporting requirements of this subpart allow agencies to confront special or unique agency concerns. If those concerns prompt an agency to seek more extensive reporting from employees who file public reports, it may proceed on a confidential, non-public basis, with prior written approval from the Director of the Office of Government Ethics, under the procedures of §§ 2634.103 and 2634.601(b).

(d) The reports filed pursuant to this subpart are specifically characterized as "confidential," and are required to be withheld from the public, pursuant to section 107(a) of the Act. Section 107(a) leaves no discretion on this issue with the agencies. See also § 2634.604. Further, Executive Order 12674 as modified by Executive Order 12731 provides, in section 201(d), for a system of nonpublic (confidential) executive branch financial disclosure to complement the Act's system of public disclosure. The confidential reports provided for by this subpart contain sensitive commercial and financial information, as well as personal privacy-protected information. These reports and the information which they contain are, accordingly, exempt from being released to the public, under exemptions 3 (A) and (B), 4, and 6 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(3) (A) and (B), (b)(4), and (b)(6). Additional FOIA exemptions may apply to particular reports or portions of reports. Agency personnel shall not publicly release the reports or

the information which these reports contain, except pursuant to an order issued by a Federal court, or as otherwise provided under applicable provisions of the Privacy Act (5 U.S.C. 552a), and in the OGE/GOVT-2 Government-wide executive branch Privacy Act system of records, as well as any applicable agency records system. If an agency statute requires the public reporting of certain information and, for purposes of convenience, an agency chooses to collect that information on the confidential report form filed under this subpart, only the special statutory information may be released to the public, pursuant to the terms of the statute under which it was collected.

(e) Executive branch agencies hire or use the paid and unpaid services of many individuals on an advisory or other less than full-time basis as special Government employees. These employees may include experts and consultants to the Government, as well as members of Government advisory committees. It is important for those agencies that utilize such services, and for the individuals who provide the services, to anticipate and avoid real or apparent conflicts of interest. The confidential financial disclosure system promotes that goal, with special Government employees among those required to file confidential reports.

(f) For additional policies and definitions of terms applicable to both the public and confidential reporting systems, see §§ 2634.104 and 2634.105.

#### § 2634.902 [Reserved]

#### § 2634.903 General requirements, filing dates, and extensions.

(a) *Incumbents.* A confidential filer who holds a position or office described in § 2634.904(a) of this subpart and who performs the duties of that position or office for a period in excess of 60 days during the calendar year (including more than 60 days in an acting capacity) shall file a confidential report as an incumbent, containing the information prescribed in §§ 2634.907 and 2634.908 of this subpart on or before February 15 of the following year. This requirement does not apply if the employee has left Government service prior to the due date for the report. No incumbent re-

ports are required of special Government employees described in § 2634.904(a)(2) of this subpart, but they must file new entrant reports under § 2634.903(b) of this subpart upon each appointment or reappointment. For confidential filers under § 2634.904(a)(3) of this subpart, consult agency supplemental regulations.

(b) *New entrants.* (1) Not later than 30 days after assuming a new position or office described in § 2634.904(a) of this subpart (which also encompasses the reappointment or redesignation of a special Government employee, including one who is serving on an advisory committee), a confidential filer shall file a confidential report containing the information prescribed in §§ 2634.907 and 2634.908 of this subpart. For confidential filers under § 2634.904(a)(3) of this subpart, consult agency supplemental regulations.

(2) However, no report shall be required if the individual:

(i) Has, within 30 days prior to assuming his position, left another position or office referred to in § 2634.904(a) of this subpart or in § 2634.202, and has previously satisfied the reporting requirements applicable to that former position, but a copy of the report filed by the individual while in that position should be made available to the appointing agency, and the individual must comply with any agency requirement for a supplementary report for the new position;

(ii) Has already filed such a report in connection with consideration for appointment to the position. The agency may request that the individual update such a report if more than six months has expired since it was filed; or

(iii) Is not reasonably expected to perform the duties of an office or position referred to in § 2634.904(a) of this subpart for more than 60 days in the following twelve-month period, as determined by the designated agency ethics official or delegate. That may occur most commonly in the case of an employee who temporarily serves in an acting capacity in a position described by § 2634.904(a)(1) of this subpart. If the individual actually performs the duties of such position for more than 60 days in the twelve-month period, then a confidential financial disclosure report

## § 2634.904

must be filed within 15 calendar days after the sixtieth day of such service in the position. Paragraph (b)(2)(iii) of § 2634.903 does not apply to new entrants filing as special Government employees under § 2634.904(a)(2) of this subpart.

(3) Notwithstanding the filing deadline prescribed in paragraph (b)(1) of this section, agencies may at their discretion, require that prospective entrants into positions described in § 2634.904(a) of this subpart file their new entrant confidential financial disclosure reports prior to serving in such positions, to insure that there are no insurmountable ethics concerns. Additionally, a special Government employee who has been appointed to serve on an advisory committee shall file the required report before any advice is rendered by the employee to the agency, or in no event, later than the first committee meeting.

(c) *Advisory committee definition.* For purposes of this subpart, the term *advisory committee* shall have the meaning given to that term under section 3 of the Federal Advisory Committee Act (5 U.S.C. app). Specifically, it means any committee, board, commission, council, conference, panel, task force, or other similar group which is established by statute or reorganization plan, or established or utilized by the President or one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government. Such term includes any subcommittee or other subgroup of any advisory committee, but does not include the Advisory Commission on Intergovernmental Relations, the Commission on Government Procurement, or any committee composed wholly of full-time officers or employees of the Federal Government.

(d) *Extensions*—(1) *Agency extensions.* The agency reviewing official may, for good cause shown, grant to any employee or class of employees a filing extension or several extensions totaling not more than 90 days.

(2) *Certain service during period of national emergency.* In the case of an active duty military officer or enlisted member of the Armed Forces, a Reserve or National Guard member on ac-

## 5 CFR Ch. XVI (1–1–16 Edition)

tive duty under orders issued pursuant to title 10 or title 32 of the United States Code, a commissioned officer of the Uniformed Services (as defined in 10 U.S.C. 101), or any other employee, who is deployed or sent to a combat zone or required to perform services away from his permanent duty station in support of the Armed Forces or other governmental entities following a declaration by the President of a national emergency, the agency reviewing official may grant such individual a filing extension to last no longer than 90 days after the last day of:

(i) The individual's service in the combat zone or away from his permanent duty station; or

(ii) The individual's hospitalization as a result of injury received or disease contracted while serving during the national emergency.

(3) *Agency procedures.* Each agency may prescribe procedures to provide for the implementation of the extensions provided for by this paragraph.

(e) *Termination reports not required.* An employee who is required to file a confidential financial disclosure report is not required to file a termination report upon leaving the filing position.

[57 FR 11826, Apr. 7, 1992, as amended at 58 FR 38912, July 21, 1993; 63 FR 69992, Dec. 18, 1998; 66 FR 55872, Nov. 5, 2001; 71 FR 28234, May 16, 2006]

## § 2634.904 Confidential filer defined.

(a) The term *confidential filer* includes:

(1) Each officer or employee in the executive branch whose position is classified at GS-15 or below of the General Schedule prescribed by 5 U.S.C. 5332, or the rate of basic pay for which is fixed, other than under the General Schedule, at a rate which is less than 120% of the minimum rate of basic pay for GS-15 of the General Schedule; each officer or employee of the United States Postal Service or Postal Rate Commission whose basic rate of pay is less than 120% of the minimum rate of basic pay for GS-15 of the General Schedule; each member of a uniformed service whose pay grade is less than O-7 under 37 U.S.C. 201; and each officer

or employee in any other position determined by the designated agency ethics official to be of equal classification; if:

(i) The agency concludes that the duties and responsibilities of the employee's position require that employee to participate personally and substantially (as defined in §§ 2635.402(b)(4) and 2640.103(a)(2) of this chapter) through decision or the exercise of significant judgment, and without substantial supervision and review, in taking a Government action regarding:

(A) Contracting or procurement;

(B) Administering or monitoring grants, subsidies, licenses, or other federally conferred financial or operational benefits;

(C) Regulating or auditing any non-Federal entity; or

(D) Other activities in which the final decision or action will have a direct and substantial economic effect on the interests of any non-Federal entity; or

(ii) The agency concludes that the duties and responsibilities of the employee's position require the employee to file such a report to avoid involvement in a real or apparent conflict of interest, and to carry out the purposes behind any statute, Executive order, rule, or regulation applicable to or administered by the employee. Positions which might be subject to a reporting requirement under this subparagraph include those with duties which involve investigating or prosecuting violations of criminal or civil law.

*Example 1 to paragraph (a)(1).* A contracting officer develops the requests for proposals for data processing equipment of significant value which is to be purchased by his agency. He works with substantial independence of action and exercises significant judgment in developing the requests. By engaging in this activity, he is participating personally and substantially in the contracting process. The contracting officer should be required to file a confidential financial disclosure report.

*Example 2 to paragraph (a)(1).* An agency environmental engineer inspects a manufacturing plant to ascertain whether the plant complies with permits to release a certain effluent into a nearby stream. Any violation of the permit standards may result in civil penalties for the plant, and in criminal penalties for the plant's management based upon any action which they took to create the violation. If the agency engineer deter-

mines that the plant does not meet the permit requirements, he can require the plant to terminate release of the effluent until the plant satisfies the permit standards. Because the engineer exercises substantial discretion in regulating the plant's activities, and because his final decisions will have a substantial economic effect on the plant's interests, the engineer should be required to file a confidential financial disclosure report.

*Example 3 to paragraph (a)(1).* A GS-13 employee at an independent grant making agency conducts the initial agency review of grant applications from nonprofit organizations and advises the Deputy Assistant Chairman for Grants and Awards about the merits of each application. Although the process of reviewing the grant applications entails significant judgment, the employee's analysis and recommendations are reviewed by the Deputy Assistant Chairman, and the Assistant Chairman, before the Chairman decides what grants to award. Because his work is subject to "substantial supervision and review," the employee is not required to file a confidential financial disclosure report unless the agency determines that filing is necessary under § 2634.904(a)(1)(ii).

*Example 4 to paragraph (a)(1).* As a senior investigator for a criminal law enforcement agency, an employee often leads investigations, with substantial independence, of suspected felonies. The investigator usually decides what information will be contained in the agency's report of the suspected misconduct. Because he participates personally and substantially through the exercise of significant judgment in investigating violations of criminal law, and because his work is not substantially supervised, the investigator should be required to file a confidential financial disclosure report.

*Example 5 to paragraph (a)(1).* An investigator is principally assigned as the field agent to investigate alleged violations of conflict of interest laws. The investigator works under the direct supervision of an agent-in-charge. The agent-in-charge reviews all of the investigator's work product and then uses those materials to prepare the agency's report which is submitted under his own name. Because of the degree of supervision involved in the investigator's duties, the investigator is not required to file a confidential disclosure report unless the agency determines that filing is necessary under § 2634.904(a)(1)(ii).

(2) Unless required to file public financial disclosure reports by subpart B of this part, all executive branch special Government employees.

*Example 1 to paragraph (a)(2).* A consultant to an agency periodically advises the agency regarding important foreign policy matters.

## § 2634.905

The consultant must file a confidential report if he is retained as a special Government employee and not an independent contractor.

*Example 2 to paragraph (a)(2).* A special Government employee serving as a member of an advisory committee (who is not a private group representative) attends four committee meetings every year to provide advice to an agency about pharmaceutical matters. No compensation is received by the committee member, other than travel expenses. The advisory committee member must file a confidential disclosure report because she is a special Government employee.

(3) Each public filer referred to in § 2634.202 on public disclosure who is required by agency regulations and forms issued in accordance with §§ 2634.103 and 2634.601(b) to file a supplemental confidential financial disclosure report which contains information that is more extensive than the information required in the reporting individual's public financial disclosure report under this part.

(4) Any employee who, notwithstanding his exclusion from the public financial reporting requirements of this part by virtue of a determination under § 2634.203, is covered by the criteria of paragraph (a)(1) of this section.

(b) Any individual or class of individuals described in paragraph (a) of this section, including special Government employees unless otherwise noted, may be excluded from all or a portion of the confidential reporting requirements of this subpart, when the agency head or designee determines that the duties of a position make remote the possibility that the incumbent will be involved in a real or apparent conflict of interest.

*Example 1 to paragraph (b).* A special Government employee who is a draftsman prepares the drawings to be used by an agency in soliciting bids for construction work on a bridge. Because he is not involved in the contracting process associated with the construction, the likelihood that this action will create a conflict of interest is remote. As a result, the special Government employee is not required to file a confidential financial disclosure report.

*Example 2 to paragraph (b).* An agency has just hired a GS-5 Procurement Assistant who is responsible for typing and processing procurement documents, answering status inquiries from the public, performing office support duties such as filing and copying, and maintaining an on-line contract database. The Assistant is not involved in con-

## 5 CFR Ch. XVI (1-1-16 Edition)

tracting and has no other actual procurement responsibilities. Thus, the possibility that the Assistant will be involved in a real or apparent conflict of interest is remote, and the Assistant is not required to file.

[71 FR 28234, May 16, 2006]

### § 2634.905 Use of alternative procedures.

(a) With the prior written approval of OGE, an agency may use an alternative procedure in lieu of filing the OGE Form 450 or OGE Optional Form 450-A. The alternative procedure may be an agency-specific form to be filed in place thereof. An agency must submit for approval a description of its proposed alternative procedure to OGE.

*Example to paragraph (a).* A nonsupervisory auditor at an agency is regularly assigned to cases involving possible loan improprieties by financial institutions. Prior to undertaking each enforcement review, the auditor reviews the file to determine if she, her spouse, minor or dependent child, or any general partner, organization in which she serves as an officer, director, trustee, employee, or general partner, or organization with which she is negotiating or has an agreement or an arrangement for future employment, or a close friend or relative is a subject of the investigation, or will be in any way affected by the investigation. Once she determines that there is no such relationship, she signs and dates a certification which verifies that she has reviewed the file and has determined that no conflict of interest exists. She then files the certification with the head of her auditing division at the agency. On the other hand, if she cannot execute the certification, she informs the head of her auditing division. In response, the division will either reassign the case or review the conflicting interest to determine whether a waiver would be appropriate. This alternative procedure, if approved by the Office of Government Ethics in writing, may be used in lieu of requiring the auditor to file a confidential financial disclosure report.

(b) An agency may use the OGE Optional Form 450-A (Confidential Certificate of No New Interests) in place of the OGE Form 450 if the agency head or designee determines it is adequate to prevent possible conflicts of interest. This form may be used by eligible filers, as described in this paragraph, who can certify, after reexamining their most recent previous OGE Form 450, that they (and their spouse and dependent children) have acquired no new interests required to be reported on

OGE Form 450, and that they have not changed jobs (no new position description or other significant change in duties) at their agency since filing that previous report. OGE Optional Form 450-A will be used under the following conditions:

(1) OGE Optional Form 450-A will only be made available for use by current employees who are not special Government employees.

(2) OGE Optional Form 450-A will only be used by incumbent filers, as described in § 2634.903(a) of this subpart, in lieu of filing an annual OGE Form 450, who have a previous OGE Form 450 on file with their agency for the position they currently hold. Its due date is as specified in § 2634.903(a), unless extended under § 2634.903(d).

(3) As indicated on the OGE Optional Form 450-A, eligible filers may use OGE Optional Form 450-A, if applicable to their circumstances, or they may file a new OGE Form 450, at their option. Therefore, a blank OGE Form 450 and its accompanying written instructions should ordinarily be distributed to them, along with the blank OGE Optional Form 450-A. The instructions to OGE Form 450 will also provide guidance on what is meant by “reportable” interests on OGE Optional Form 450-A. In lieu of distributing a blank OGE Form 450 and its instructions, agencies may choose to develop separate guidance on the meaning of “reportable” interests, or they may refer certificate users to guidance contained in any available source, such as the Office of Government Ethics’ Web site on the Internet or agency-approved electronic software for OGE Form 450. Filers would then also have to be advised of where to obtain a blank OGE Form 450, if needed.

(4) OGE Optional Form 450-A may be used by eligible filers for a maximum of three consecutive years before they are required to complete a new OGE Form 450 every fourth year, on a uniform basis for all incumbent (annual) filers, as provided in paragraph (b)(5) of this section. Agencies may, however, elect to permit use of the OGE Optional Form 450-A for only one year (or two years), and to require a new OGE Form 450 every second (or third) year, on a uniform basis for all incumbent

filers, as provided in paragraph (b)(5) of this section.

(5) In each year divisible by four, beginning in 2000 (or divisible by two or three, beginning in 1998, for agencies that choose one of the more frequent options described in the second sentence of paragraph (b)(4) of this section), all incumbent filers, as described in § 2634.903(a) of this subpart, must file a new OGE Form 450 rather than OGE Optional Form 450-A, regardless of how recently they may have filed an OGE Form 450 (either as a new entrant or as an annual filer who was not eligible to use, or chose not to use, the optional certificate).

(6) When submitting OGE Optional Form 450-A, filers are not required to attach a copy of their previous OGE Form 450, unless their agency determines that it is necessary. Filers should be encouraged, however, to retain a copy of their previous OGE Form 450, so that it will be readily available for their examination prior to completing an OGE Optional Form 450-A.

[57 FR 11826, Apr. 7, 1992; 57 FR 21855, May 22, 1992, as amended at 62 FR 33976, June 24, 1997; 71 FR 28235, May 16, 2006]

#### **§ 2634.906 Review of confidential filer status.**

The head of each agency, or an officer designated by the head of the agency for that purpose, shall review any complaint by an individual that his position has been improperly determined by the agency to be one which requires the submission of a confidential financial disclosure report pursuant to this subpart. A decision by the agency head or designee regarding the complaint shall be final.

[72 FR 56242, Oct. 3, 2007]

#### **§ 2634.907 Report contents.**

(a) Other than the reports described in § 2634.904(a)(3) of this subpart, each confidential financial disclosure report shall comply with instructions issued by the Office of Government Ethics and include on the standardized form prescribed by OGE (see § 2634.601 of subpart F of this part) the information described in paragraphs (b) through (g) of this section for the filer. Each report

## § 2634.907

## 5 CFR Ch. XVI (1–1–16 Edition)

shall also include the information described in paragraph (h) of this section for the filer's spouse and dependent children.

(b) *Noninvestment income.* Each financial disclosure report shall disclose the source of earned or other noninvestment income in excess of \$200 received by the filer from any one source or which has accrued to the filer's benefit during the reporting period, including:

(1) Salaries, fees, commissions, wages and any other compensation for personal services (other than from United States Government employment);

(2) Any honoraria, including payments made or to be made to charitable organizations on behalf of the filer in lieu of honoraria; and

NOTE TO PARAGRAPH (b)(2): In determining whether an honorarium exceeds the \$200 threshold, subtract any actual and necessary travel expenses incurred by the filer and one relative, if the expenses are paid or reimbursed by the filer. If such expenses are paid or reimbursed by the honorarium source, they shall not be counted as part of the honorarium payment.

(3) Any other noninvestment income, such as prizes, scholarships, awards, gambling income or discharge of indebtedness.

*Example to paragraphs (b)(1) and (b)(3).* A filer teaches a course at a local community college, for which she receives a salary of \$1,000 per year. She also received, during the previous reporting period, a \$250 award for outstanding local community service. She must disclose both.

(c) *Assets and investment income.* Each financial disclosure report shall disclose separately:

(1) Each item of real and personal property having a fair market value in excess of \$1,000 held by the filer at the end of the reporting period in a trade or business, or for investment or the production of income, including but not limited to:

- (i) Real estate;
- (ii) Stocks, bonds, securities, and futures contracts;
- (iii) Livestock owned for commercial purposes;
- (iv) Commercial crops, either standing or held in storage;
- (v) Antiques or art held for resale or investment;

(vi) Vested beneficial interests in trusts and estates;

(vii) Pensions and annuities;

(viii) Sector mutual funds (see definition at § 2640.102(q) of this chapter);

(ix) Accounts or other funds receivable; and

(x) Capital accounts or other asset ownership in businesses.

(2) The source of investment income (dividends, rents, interest, capital gains, or the income from qualified or excepted trusts or excepted investment funds (see paragraph (i) of this section)), which is received by the filer or accrued to his benefit during the reporting period, and which exceeds \$200 in amount or value from any one source, including but not limited to income derived from:

- (i) Real estate;
- (ii) Collectible items;
- (iii) Stocks, bonds, and notes;
- (iv) Copyrights;
- (v) Vested beneficial interests in trusts and estates;
- (vi) Pensions;
- (vii) Sector mutual funds (see definition at § 2640.102(q) of this chapter);
- (viii) The investment portion of life insurance contracts;
- (ix) Loans;
- (x) Gross income from a business;
- (xi) Distributive share of a partnership;
- (xii) Joint business venture income; and
- (xiii) Payments from an estate or an annuity or endowment contract.

NOTE TO PARAGRAPHS (c)(1) AND (c)(2): For Individual Retirement Accounts (IRAs), brokerage accounts, trusts, mutual or pension funds, and other entities with portfolio holdings, each underlying asset must be separately disclosed, unless the entity qualifies for special treatment under paragraph (i) of this section.

(3) *Exemptions.* The following assets and investment income are exempt from the reporting requirements of paragraphs (c)(1) and (c)(2) of this section:

- (i) A personal residence, as defined in § 2634.105(1), of the filer or spouse;
- (ii) Accounts (including both demand and time deposits) in depository institutions, including banks, savings and loan associations, credit unions, and



## Office of Government Ethics

## § 2634.907

similar depository financial institutions;

(iii) Money market mutual funds and accounts;

(iv) U.S. Government obligations, including Treasury bonds, bills, notes, and savings bonds;

(v) Government securities issued by U.S. Government agencies;

(vi) Financial interests in any retirement system of the United States (including the Thrift Savings Plan) or under the Social Security Act; and

(vii) Diversified mutual funds. (“Diversified” means that the fund does not have a stated policy of concentrating its investments in any industry, business, single country other than the United States, or bonds of a single State within the United States and, in the case of an employee benefit plan, means that the plan’s trustee has a written policy of varying plan investments. Whether a mutual fund meets this standard may be determined by checking the fund’s prospectus or by calling a broker or the manager of the fund.)

*Example 1 to paragraph (c).* A filer owns a beach house which he rents out for several weeks each summer, receiving annual rental income of approximately \$5,000. He must report the rental property, as well as the city and state in which it is located.

*Example 2 to paragraph (c).* A filer’s investment portfolio consists of several stocks, U.S. Treasury bonds, several cash bank deposit accounts, an account in the Government’s Thrift Savings Plan, and shares in sector mutual funds and diversified mutual funds. He must report the name of each sector mutual fund in which he owns shares, and the name of each company in which he owns stock, valued at over \$1,000 at the end of the reporting period or from which he received income of more than \$200 during the reporting period. He need not report his diversified mutual funds, U.S. Treasury bonds, bank deposit accounts, or Thrift Savings Plan holdings.

(d) *Liabilities.* Each financial disclosure report filed pursuant to this subpart shall identify liabilities in excess of \$10,000 owed by the filer at any time during the reporting period, and the name and location of the creditors to whom such liabilities are owed, except:

(1) Personal liabilities owed to a spouse or to the parent, brother, sister, or child of the filer, spouse, or dependent child;

(2) Any mortgage secured by a personal residence of the filer or his spouse;

(3) Any loan secured by a personal motor vehicle, household furniture, or appliances, provided that the loan does not exceed the purchase price of the item which secures it;

(4) Any revolving charge account;

(5) Any student loan; and

(6) Any loan from a bank or other financial institution on terms generally available to the public.

*Example to paragraph (d).* A filer owes \$2,500 to his mother-in-law and \$12,000 to his best friend. He also has a \$15,000 balance on his credit card, a \$200,000 mortgage on his personal residence, and a car loan. Under the financial disclosure reporting requirements, he need not report the debt to his mother-in-law, his credit card balance, his mortgage, or his car loan. He must, however, report the debt of over \$10,000 to his best friend.

(e) *Positions with non-Federal organizations*—(1) *In general.* Each financial disclosure report filed pursuant to this subpart shall identify all positions held at any time by the filer during the reporting period, other than with the United States, as an officer, director, trustee, general partner, proprietor, representative, executor, employee, or consultant of any corporation, company, firm, partnership, trust, or other business enterprise, any nonprofit organization, any labor organization, or any educational or other institution.

(2) *Exemptions.* The following positions are exempt from the reporting requirements of paragraph (e)(1) of this section:

(i) Positions held in religious, social, fraternal, or political entities; and

(ii) Positions solely of an honorary nature, such as those with an emeritus designation.

*Example to paragraph (e).* A filer holds outside positions as the trustee of his family trust, the secretary of a local political party committee, and the “Chairman emeritus” of his town’s Lions Club. He also is a principal of a tutoring school on weekends. The individual must report his outside positions as trustee of the family trust and as principal of the school. He does not need to report his positions as secretary of the local political party committee or “Chairman emeritus” because each of these positions is exempt.

(f) *Agreements and arrangements.* Each financial disclosure report filed pursuant to this subpart shall identify the parties to, and shall briefly describe the terms of, any agreement or arrangement of the filer in existence at any time during the reporting period with respect to:

(1) Future employment (including the date on which the filer entered into the agreement for future employment);

(2) A leave of absence from employment during the period of the filer's Government service;

(3) Continuation of payments by a former employer other than the United States Government; and

(4) Continuing participation in an employee welfare or benefit plan maintained by a former employer.

*Example 1 to paragraph (f).* A filer plans to retire from Government service in eight months. She has negotiated an arrangement for part-time employment with a private-sector company, to commence upon her retirement. On her financial disclosure report, she must identify the future employer, and briefly describe the terms of, this agreement and disclose the date on which she entered into the agreement.

*Example 2 to paragraph (f).* A new employee who has entered a position which requires the filing of a confidential form is on a leave of absence from his private-sector employment. During his Government tenure, he will continue to receive deferred compensation from this employer, and will continue to participate in its pension plan. He must report and briefly describe his arrangements for a leave of absence, for the receipt of deferred compensation, and for participation in the pension plan.

(g) *Gifts and travel reimbursements—(1) Gifts.* Each annual financial disclosure report filed pursuant to this subpart shall contain a brief description of all gifts aggregating more than \$375 in value which are received by the filer during the reporting period from any one source, as well as the identity of the source. For in-kind travel-related gifts, the report shall include a travel itinerary, the dates, and the nature of expenses provided.

(2) *Travel reimbursements.* Each annual financial disclosure report filed pursuant to this subpart shall contain a brief description (including a travel itinerary, dates, and the nature of expenses provided) of any travel-related reimbursements aggregating more than

\$375 in value which are received by the filer during the reporting period from any one source, as well as the identity of the source.

(3) *Aggregation exception.* Any gift or travel reimbursement with a fair market value of \$150 or less need not be aggregated for purposes of the reporting rules of this section. However, the acceptance of gifts, whether or not reportable, is subject to the restrictions imposed by Executive Order 12674, as modified by Executive Order 12731, and the implementing regulations on standards of ethical conduct.

(4) *Valuation of gifts and travel reimbursements.* The value to be assigned to a gift or travel reimbursement is its fair market value. For most reimbursements, this will be the amount actually received. For gifts, the value should be determined in one of the following manners:

(i) If the gift has been newly purchased or is readily available in the market, the value shall be its retail price. The filer need not contact the donor, but may contact a retail establishment selling similar items to determine the present cost in the market.

(ii) If the item is not readily available in the market, such as a piece of art, a handmade item, or an antique, the filer may make a good faith estimate of the value of the item.

(iii) The term “readily available in the market” means that an item generally is available for retail purchase in the metropolitan area nearest to the filer's residence.

(5) New entrants, as described in § 2634.903(b) of this subpart, need not report any information on gifts and travel reimbursements.

(6) *Exemptions.* Reports need not contain any information about gifts and travel reimbursements received from relatives (see § 2634.105(o)) or during a period in which the filer was not an officer or employee of the Federal Government. Additionally, any food, lodging, or entertainment received as “personal hospitality of any individual”, as defined in § 2634.105(k), need not be reported. See also exclusions specified in the definitions of “gift” and “reimbursement” at § 2634.105(h) and (n).

*Example to paragraph (g).* A filer accepts a briefcase, a pen and pencil set, a paperweight, and a palm pilot from a community service organization he has worked with solely in his private capacity. He determines that the value of these gifts is:

Gift 1—Briefcase: \$200

Gift 2—Pen and Pencil Set: \$35

Gift 3—Paperweight: \$5

Gift 4—Palm Pilot: \$275

The filer must disclose gifts 1 and 4 since, together, they aggregate more than \$375 in value from the same source. He need not aggregate or report gifts 2 and 3 because each gift's value does not exceed \$150.

(h) *Disclosure rules for spouses and dependent children*—(1) *Noninvestment income.* (i) Each financial disclosure report required by the provisions of this subpart shall disclose the source of earned income in excess of \$1,000 from any one source, which is received by the filer's spouse or which has accrued to the spouse's benefit during the reporting period. If earned income is derived from a spouse's self-employment in a business or profession, the report shall also disclose the nature of the business or profession. The filer is not required to report other noninvestment income received by the spouse such as prizes, scholarships, awards, gambling income, or a discharge of indebtedness.

(ii) Each report shall disclose the source of any honoraria received by or accrued to the spouse (or payments made or to be made to charity on the spouse's behalf in lieu of honoraria) in excess of \$200 from any one source during the reporting period.

*Example to paragraph (h)(1).* A filer's husband has a seasonal part-time job as a sales clerk at a department store, for which he receives a salary of \$1,000 per year. He also received, during the previous reporting period, a \$250 award for outstanding local community service, and an honorarium of \$250 from the state university. The filer need not report either her husband's outside earned income or award because neither exceeded \$1,000. She must, however, report the source of the honorarium because it exceeded \$200.

(2) *Assets and investment income.* Each confidential financial disclosure report shall disclose the assets and investment income described in paragraph (c) of this section and held by the spouse or dependent child of the filer, unless the following three conditions are satisfied:

(i) The filer certifies that the item represents the spouse's or dependent child's sole financial interest, and that the filer has no specific knowledge regarding that item;

(ii) The item is not in any way, past or present, derived from the income, assets or activities of the filer; and

(iii) The filer neither derives, nor expects to derive, any financial or economic benefit from the item.

NOTE TO PARAGRAPH (h)(2): One who prepares a joint tax return with his spouse will normally derive a financial or economic benefit from assets held by the spouse, and will also be charged with knowledge of such items; therefore, he could not avail himself of this exception. Likewise, a trust for the education of one's minor child normally will convey a financial benefit to the parent. If so, the assets of the trust would be reportable on a financial disclosure report.

(3) *Liabilities.* Each confidential financial disclosure report shall disclose all information concerning liabilities described in paragraph (d) of this section and owed by a spouse or dependent child, unless the following three conditions are satisfied:

(i) The filer certifies that the item represents the spouse's or dependent child's sole financial responsibility, and that the filer has no specific knowledge regarding that item;

(ii) The item is not in any way, past or present, derived from the activities of the filer; and

(iii) The filer neither derives, nor expects to derive, any financial or economic benefit from the item.

(4) *Gifts and travel reimbursements.* (i) Each annual confidential financial disclosure report shall disclose gifts and reimbursements described in paragraph (g) of this section and received by a spouse or dependent child which are not received totally independently of their relationship to the filer.

(ii) A filer who is a new entrant as described in § 2634.903(b) of this subpart is not required to report information regarding gifts and reimbursements received by a spouse or dependent child.

(5) *Divorce and separation.* A filer need not report any information about:

(i) A spouse living separate and apart from the filer with the intention of terminating the marriage or providing for permanent separation;

## § 2634.907

(ii) A former spouse or a spouse from whom the filer is permanently separated; or

(iii) Any income or obligations of the filer arising from dissolution of the filer's marriage or permanent separation from a spouse.

*Example to paragraph (h)(5).* A filer and her husband are living apart in anticipation of divorcing. The filer need not report any information about her spouse's sole assets and liabilities, but she must continue to report their joint assets and liabilities.

(i) *Trusts, estates, and investment funds—(1) In general.* (i) Except as otherwise provided in this section, each confidential financial disclosure report shall include the information required by this subpart about the holdings of any trust, estate, investment fund or other financial arrangement from which income is received by, or with respect to which a beneficial interest in principal or income is held by, the filer, his spouse, or dependent child.

(ii) No information, however, is required about a nonvested beneficial interest in the principal or income of an estate or trust. A vested interest is a present right or title to property, which carries with it an existing right of alienation, even though the right to possession or enjoyment may be postponed to some uncertain time in the future. This includes a future interest when one has a right, defeasible or indefeasible, to the immediate possession or enjoyment of the property, upon the ceasing of another's interest. Accordingly, it is not the uncertainty of the time of enjoyment in the future, but the uncertainty of the right of enjoyment (title and alienation), which differentiates a "vested" and a "non-vested" interest.

NOTE TO PARAGRAPH (i)(1): Nothing in this section requires the reporting of the holdings of a revocable inter vivos trust (also known as a "living trust") with respect to which the filer, his spouse or dependent child has only a remainder interest, whether or not vested, provided that the grantor of the trust is neither the filer, the filer's spouse, nor the filer's dependent child. Furthermore, nothing in this section requires the reporting of the holdings of a revocable inter vivos trust from which the filer, his spouse or dependent child receives any discretionary distribution, provided that the grantor of the trust is neither

## 5 CFR Ch. XVI (1–1–16 Edition)

the filer, the filer's spouse, nor the filer's dependent child.

(2) *Qualified trusts and excepted trusts.*

(i) A filer should not report information about the holdings of any qualified blind trust (as defined in § 2634.402) or any qualified diversified trust (as defined in § 2634.402).

(ii) In the case of an excepted trust, a filer should indicate the general nature of its holdings, to the extent known, but does not otherwise need to report information about the trust's holdings. For purposes of this part, the term "excepted trust" means a trust:

(A) Which was not created directly by the filer, spouse, or dependent child; and

(B) The holdings or sources of income of which the filer, spouse, or dependent child have no specific knowledge through a report, disclosure, or constructive receipt, whether intended or inadvertent.

(3) *Excepted investment funds.* (i) No information is required under paragraph (i)(1) of this section about the underlying holdings of an excepted investment fund as defined in paragraph (i)(3)(ii) of this section, except that the fund itself shall be identified as an interest in property and/or a source of income.

(ii) For purposes of financial disclosure reports filed under the provisions of this subpart, an "excepted investment fund" means a widely held investment fund (whether a mutual fund, regulated investment company, common trust fund maintained by a bank or similar financial institution, pension or deferred compensation plan, or any other investment fund), if:

(A)(1) The fund is publicly traded or available; or

(2) The assets of the fund are widely diversified; and

(B) The filer neither exercises control over nor has the ability to exercise control over the financial interests held by the fund.

(iii) A fund is widely diversified if it holds no more than 5% of the value of its portfolio in the securities of any one issuer (other than the United States Government) and no more than 20% in any particular economic or geographic sector.

## Office of Government Ethics

## § 2634.1001

(j) *Special rules.* (1) Political campaign funds, including campaign receipts and expenditures, need not be included in any report filed under this subpart. However, if the individual has authority to exercise control over the fund's assets for personal use rather than campaign or political purposes, that portion of the fund over which such authority exists must be reported.

(2) In lieu of entering data on a part of the report form designated by the Office of Government Ethics, a filer may attach to the reporting form a copy of a brokerage report, bank statement, or other material, which, in a clear and concise fashion, readily discloses all information which the filer would otherwise have been required to enter on the concerned part of the report form.

(k) For reports of confidential filers described in § 2634.904(a)(3) of this subpart, each supplemental confidential financial disclosure report shall include only the supplemental information:

(1) Which is more extensive than that required in the reporting individual's public financial disclosure report under this part; and

(2) Which has been approved by the Office of Government Ethics for collection by the agency concerned, as set forth in supplemental agency regulations and forms, issued under §§ 2634.103 and 2634.601(b) (see § 2634.901(b) and (c) of this subpart).

[71 FR 28236, May 16, 2006, as amended at 73 FR 15388, Mar. 24, 2008; 76 FR 38548, July 1, 2011; 77 FR 39150, July 2, 2012; 79 FR 28606, May 19, 2014]

### § 2634.908 Reporting periods.

(a) *Incumbents.* Each confidential financial disclosure report filed under § 2634.903(a) of this subpart shall include on the standard form prescribed by the Office of Government Ethics and in accordance with instructions issued by the Office, a full and complete statement of the information required to be reported according to the provisions of this subpart for the preceding calendar year, or for any portion of that period not covered by a previous confidential or public financial disclosure report filed under this part.

(b) *New entrants.* Each confidential financial disclosure report filed under

§ 2634.903(b) of this subpart shall include, on the standard form prescribed by the Office of Government Ethics and in accordance with instructions issued by the Office, a full and complete statement of the information required to be reported according to the provisions of this subpart for the preceding twelve months from the date of filing.

[57 FR 11826, Apr. 7, 1992, as amended at 71 FR 28239, May 16, 2006]

### § 2634.909 Procedures, penalties, and ethics agreements.

(a) The provisions of subpart F of this part govern the filing procedures and forms for, and the custody and review of, confidential disclosure reports filed under this subpart.

(b) For penalties and remedial action which apply in the event that the reporting individual fails to file, falsifies information, or files late with respect to confidential financial disclosure reports, see subpart G of this part.

(c) Subpart H of this part on ethics agreements applies to both the public and confidential reporting systems under this part.

## Subpart J—Certificates of Divestiture

SOURCE: 69 FR 44894, July 28, 2004, unless otherwise noted.

### § 2634.1001 Overview.

(a) *Scope.* 26 U.S.C. 1043 and the rules of this subpart allow an eligible person to defer paying capital gains tax on property sold to comply with conflict of interest requirements. To defer the gains, an eligible person must obtain a Certificate of Divestiture from the Director of the Office of Government Ethics before selling the property. This subpart describes the circumstances when an eligible person may obtain a Certificate of Divestiture and establishes the procedure that the Office of Government Ethics uses to issue Certificates of Divestiture.

(b) *Purpose.* The purpose of section 1043 and this subpart is to minimize the burden that would result from paying capital gains tax on the sale of assets to comply with conflict of interest requirements. Minimizing this burden

## § 2634.1002

aids in attracting and retaining highly qualified personnel in the executive branch and ensures the confidence of the public in the integrity of Government officials and decision-making processes.

### § 2634.1002 Role of the Internal Revenue Service.

The Internal Revenue Service (IRS) has jurisdiction over the tax aspects of a divestiture made pursuant to a Certificate of Divestiture. Eligible persons seeking to defer capital gains:

- (a) Must follow IRS requirements for reporting dispositions of property and electing under section 1043 not to recognize capital gains; and
- (b) Should consult a personal tax advisor or the IRS for guidance on these matters.

### § 2634.1003 Definitions.

For purposes of this subpart:

*Eligible person* means:

- (1) Any officer or employee of the executive branch of the Federal Government, except a person who is a special Government employee as defined in 18 U.S.C. 202;
- (2) The spouse or any minor or dependent child of the individual referred to in paragraph (1) of this definition; and
- (3) Any trustee holding property in a trust in which an individual referred to in paragraph (1) or (2) of this definition has a beneficial interest in principal or income.

*Permitted property* means:

- (1) An obligation of the United States; or
- (2) A diversified investment fund. A diversified investment fund is a diversified mutual fund or diversified unit investment trust, as defined in 5 CFR 2640.102(a), (k) and (u);
- (3) Provided, however, a permitted property cannot be any holding prohibited by statute, regulation, rule, or Executive order. As a result, requirements applicable to specific agencies and positions may limit an eligible person's choices of permitted property. An employee seeking a Certificate of Divestiture should consult the appropriate designated agency ethics official to determine whether a statute, regula-

## 5 CFR Ch. XVI (1–1–16 Edition)

tion, rule, or Executive order may limit choices of permitted property.

### § 2634.1004 General rule.

(a) The Director of the Office of Government Ethics may issue a Certificate of Divestiture for specific property in accordance with the procedures of § 2634.1005 of this subpart if:

- (1) The Director determines that divestiture of the property by an eligible person is reasonably necessary to comply with 18 U.S.C. 208, or any other Federal conflict of interest statute, regulation, rule, or Executive order; or
- (2) A congressional committee requires divestiture as a condition of confirmation.

(b) The Director of the Office of Government Ethics cannot issue a Certificate of Divestiture for property that already has been sold.

*Example 1 to § 2634.1004:* An employee is directed to divest shares of stock, a limited partnership interest, and foreign currencies. If the sale of these assets will result in capital gains under the Internal Revenue Code, the employee may request and receive a Certificate of Divestiture.

*Example 2 to § 2634.1004:* An employee of the Department of Commerce is directed to divest his shares of XYZ stock acquired through the exercise of options held in an employee benefit plan. His gain from the sale of the stock will be treated as ordinary income. Because only capital gains realized under Federal tax law are eligible for deferral under section 1043, a Certificate of Divestiture cannot be issued for the sale of the XYZ stock.

*Example 3 to § 2634.1004:* During her Senate confirmation hearing, a nominee to a Department of Defense (DOD) position is directed to divest stock in a DOD contractor as a condition of her confirmation. Eager to comply with the order to divest, the nominee sells her stock immediately after the hearing and prior to being confirmed by the Senate. Once she is a DOD employee, she requests a Certificate of Divestiture for the stock. Because the Office of Government Ethics cannot issue a Certificate of Divestiture for property that has already been divested, the employee's request for a Certificate of Divestiture will be denied.

*Example 4 to § 2634.1004:* After receiving a Certificate of Divestiture, the spouse of a Food and Drug Administration employee sold stock in a regulated company. Between the time of the request for the Certificate of Divestiture and the sale of the stock, the stock price dropped and the spouse sold the stock at a loss. Because the sale of the stock

did not result in capital gains, the spouse has no need for the Certificate of Divestiture and cannot submit it to the Internal Revenue Service for deferral of gains. No further action need be taken by the employee or the employee's spouse in connection with the Certificate of Divestiture.

**§ 2634.1005 How to obtain a Certificate of Divestiture.**

(a) *Employee's request to the designated agency ethics official.* An employee seeking a Certificate of Divestiture must submit a written request to the designated agency ethics official at his or her agency. The request must contain:

(1) A full and specific description of the property that will be divested. For example, if the property is corporate stock, the request must include the number of shares for which the eligible person seeks a Certificate of Divestiture;

(2) A brief description of how the eligible person acquired the property;

(3) A statement that the eligible person holding the property has agreed to divest the property; and

(4)(i) The date that the requirement to divest first applied; or

(ii) The date the employee first agreed that the eligible person would divest the property in order to comply with conflict of interest requirements.

(b) *Designated agency ethics official's submission to the Office of Government Ethics.* The designated agency ethics official must forward to the Director of the Office of Government Ethics the employee's written request described in paragraph (a) of this section. In addition, the designated agency ethics official must submit:

(1) A copy of the employee's latest financial disclosure report. If the employee is not required to file a financial disclosure report, the designated agency ethics official must obtain from the employee, and submit to the Office of Government Ethics, a listing of the employee's interests that would be required to be disclosed on a confidential financial disclosure report excluding gifts and travel reimbursements. For purposes of this listing, the reporting period is the preceding twelve months from the date the requirement to divest first applied or the date the employee first agreed that the eligible person would divest the property;

(2) An opinion that describes why divestiture of the property is reasonably necessary to comply with 18 U.S.C. 208, or any other Federal conflict of interest statute, regulation, rule, or Executive order; and

(3) A brief description of the employee's position or a citation to a statute that sets forth the duties of the position.

(c) *Divestitures required by a congressional committee.* In the case of a divestiture required by a congressional committee as a condition of confirmation, the designated agency ethics official must submit appropriate evidence that the committee requires the divestiture. A transcript of congressional testimony or a written statement from the designated agency ethics official concerning the committee's custom regarding divestiture are examples of evidence of the committee's requirements.

(d) *Divestitures for property held in a trust.* In the case of divestiture of property held in a trust, the employee must submit a copy of the trust instrument, as well as a list of the trust's current holdings, unless the holdings are listed on the employee's most recent financial disclosure report. In certain cases involving divestiture of property held in a trust, the Director may not issue a Certificate of Divestiture unless the parties take actions which, in the opinion of the Director, are appropriate to exclude, to the extent practicable, parties other than eligible persons from benefitting from the deferral of capital gains. Such actions may include, as permitted by applicable State law, division of the trust into separate portfolios, special distributions, dissolution of the trust, or anything else deemed feasible by the Director, in his or her sole discretion.

*Example 1 to paragraph (d):* An employee has a 90% beneficial interest in an irrevocable trust created by his grandfather. His four adult children have the remaining 10% beneficial interest in the trust. A number of the assets held in the trust must be sold to comply with conflicts of interest requirements. Due to State law, no action can be taken to separate the trust assets. Because the adult children have a small interest in the trust and the assets cannot be separated,

## § 2634.1006

the Director may consider issuing a Certificate of Divestiture to the trustee for the sale of all of the conflicting assets.

(e) *Time requirements.* A request for a Certificate of Divestiture does not extend the time in which an employee otherwise must divest property required to be divested pursuant to an ethics agreement, or prohibited by statute, regulation, rule, or Executive order. Therefore, an employee must submit his or her request for a Certificate of Divestiture as soon as possible once the requirement to divest becomes applicable. The Office of Government Ethics will consider requests submitted beyond the applicable time period for divestiture. If the designated agency ethics official submits a request to the Office of Government Ethics beyond the applicable time period for divestiture, he must explain the reason for the delay. (See 5 CFR 2634.802 and 2635.403 for rules relating to the time requirements for divestiture.)

(f) *Response by the Office of Government Ethics.* After reviewing the materials submitted by the employee and the designated agency ethics official, and making a determination that all requirements have been met, the Director will issue a Certificate of Divestiture. The certificate will be sent to the designated agency ethics official who will then forward it to the employee.

## § 2634.1006 Rollover into permitted property.

(a) *Reinvestment of proceeds.* In order to qualify for deferral of capital gains, an eligible person must reinvest the proceeds from the sale of the property divested pursuant to a Certificate of Divestiture into permitted property during the 60-day period beginning on the date of the sale. The proceeds may be reinvested into one or more types of permitted property.

*Example 1 to paragraph (a):* A recently hired employee of the Department of Transportation receives a Certificate of Divestiture for the sale of a large block of stock in an airline. He may split the proceeds of the sale and reinvest them in an S&P Index Fund, a diversified Growth Stock Fund, and U.S. Treasury bonds.

*Example 2 to paragraph (a):* The Secretary of Treasury sells certain stock after receiving a Certificate of Divestiture and is considering reinvesting the proceeds from the sale

## 5 CFR Ch. XVI (1–1–16 Edition)

into U.S. Treasury securities. However, because the Secretary of the Treasury is prohibited by 31 U.S.C. 329 from being involved in buying obligations of the United States Government, the Secretary cannot reinvest the proceeds in such securities. However, she may invest the proceeds in a diversified mutual fund. See the definition of *permitted property* at § 2634.1003.

(b) *Internal Revenue Service reporting requirements.* An eligible person who elects to defer the recognition of capital gains from the sale of property pursuant to a Certificate of Divestiture must follow Internal Revenue Service rules for reporting the sale of the property and the reinvestment transaction.

## § 2634.1007 Cases in which Certificates of Divestiture will not be issued.

The Director of the Office of Government Ethics, in his or her sole discretion, may deny a request for a Certificate of Divestiture in cases where an unfair or unintended benefit would result. Examples of such cases include:

(a) *Employee benefit plans.* The Director will not issue a Certificate of Divestiture if the property is held in a pension, profit-sharing, stock bonus, or other employee benefit plan and can otherwise be rolled over into an eligible tax-deferred retirement plan within the 60-day reinvestment period.

(b) *Complete divestiture.* The Director will not issue a Certificate of Divestiture unless the employee agrees to divest all of the property that presents a conflict of interest, as well as other similar or related property that presents a conflict of interest under a Federal conflict of interest statute, regulation, rule, or Executive order. However, any property that qualifies for a regulatory exemption at 5 CFR part 2640 need not be divested for a Certificate of Divestiture to be issued.

*Example 1 to paragraph (b):* A Department of Agriculture employee owns shares of stock in Better Workspace, Inc. valued at \$25,000. As part of his official duties, the employee is assigned to evaluate bids for a contract to renovate office space at his agency. The Department's designated agency ethics official discovers that Better Workspace is one of the companies that has submitted a bid and directs the employee to sell his stock in the company. Because Better Workspace is a publicly traded security, the employee could retain up to \$15,000 of the stock under



## Office of Government Ethics

## Pt. 2634, App. B

the regulatory exemption for interests in securities at 5 CFR 2640.202(a). He would be able to request a Certificate of Divestiture for the \$10,000 of Better Workspace stock that is not covered by the exemption. Alternatively, he could request a Certificate of Divestiture for the entire \$25,000 worth of stock. If he chooses to sell his stock down to an amount permitted under the regulatory exemption, the Office of Government Ethics will not issue additional Certificates of Divestiture if the value of the stock goes above \$15,000 again.

(c) *Property acquired under improper circumstances.* The Director will not issue a Certificate of Divestiture:

(1) If the eligible person acquired the property at a time when its acquisition was prohibited by statute, regulation, rule, or Executive order; or

(2) If circumstances would otherwise create the appearance of a conflict with the conscientious performance of Government responsibilities.

### **§ 2634.1008 Public access to a Certificate of Divestiture.**

A Certificate of Divestiture issued pursuant to the provisions of this subpart is available to the public in accordance with the rules of § 2634.603 of this part.

#### **APPENDIX A TO PART 2634—CERTIFICATE OF INDEPENDENCE (FORM APPROVED: OMB CONTROL NO. 3209-0007)**

The Certificate of Independence required by § 2634.405(d)(2) shall be executed as follows:

##### **CERTIFICATE OF INDEPENDENCE**

With respect to the trust of \_\_\_\_\_ (Settlor), which has been submitted to the Office of Government Ethics for certification pursuant to the Ethics in Government Act of 1978 (Pub. L. 95-521, as amended), the undersigned proposed [Trustee] [\_\_\_\_\_] of such trust is a financial institution which is eligible to serve in such fiduciary capacity in accordance with section 102(f)(3)(A) of such Act:

FIRST: The undersigned is (check one)—

( ) a bank, as defined in 12 U.S.C. 1841(c), or

( ) an investment adviser, as defined in 15 U.S.C. 80b-2(a)(11), not more than 10 percent of which is owned or controlled by a single individual.

SECOND: The undersigned—

(1) Is independent of and unassociated with any interested party so that the undersigned cannot be controlled or influenced in the administration of the trust by any interested party; and

(2) is not and has not been affiliated with any interested party, and is not a partner of, or involved in any joint venture or other investment or business with any interested party.

THIRD: Any director, officer, or employee of the undersigned—

(1) Is independent of and unassociated with any interested party so that such director, officer, or employee cannot be controlled or influenced in the administration of the trust by any interested party;

(2) Is not and has not been employed by any interested party, nor a director, officer, or employee of any organization affiliated with any interested party, and is not and has not been a partner of, or involved in any joint venture or other investment or business with, any interested party; and

(3) Is not a relative of any interested party.

FOURTH: The undersigned certifies that the statements contained herein are true, complete and correct to the best of such undersigned's knowledge and belief.

Date \_\_\_\_\_

(firm) \_\_\_\_\_

By: \_\_\_\_\_

(title) \_\_\_\_\_

NOTE: See Appendix C of this part for Privacy Act and Paperwork Reduction Act notices.

[57 FR 11829, Apr. 7, 1992, as amended at 63 FR 58620, Nov. 2, 1998; 77 FR 39150, July 2, 2012]

#### **APPENDIX B TO PART 2634—CERTIFICATE OF COMPLIANCE (FORM APPROVED: OMB CONTROL NO. 3209-0007)**

The Certificate of Compliance required by § 2634.408(d)(4) shall be executed as follows:

##### **CERTIFICATE OF COMPLIANCE**

With respect to the qualified blind trust (qualified diversified trust) of \_\_\_\_\_ (Settlor), the undersigned, the approved [Trustee] [\_\_\_\_\_] of such trust, pursuant to 5 CFR 2634.405, has served in such fiduciary capacity during the calendar year [or for the period beginning \_\_\_\_\_ and ending \_\_\_\_\_] and is eligible to continue in such capacity by virtue of the following:

FIRST: The undersigned (and any director, officer, or employee) has not knowingly or negligently, and will not—

(A) disclose any information to an interested party with respect to the trust that may not be disclosed pursuant to title I of the Act, the implementing regulations (including 5 CFR 2634.408(d)(1)(i)), or the trust instrument;

(B) acquire any holding the ownership of which is prohibited by, or not in accordance with, applicable statute, regulation, or the terms of the trust instrument;

(C) solicit advice from any interested party with respect to such trust, which solicitation is prohibited by title I of the Act, the implementing regulations (including 5 CFR 2634.408(d)(1)(iii)), or the trust instrument;

(D) fail to file any document required by title I of the Act, the implementing regulations (5 CFR 2634.408), or the trust instrument; or

(E) violate or fail to comply with any provision or requirement of title I of the Act, the implementing regulations, or the trust instrument.

SECOND: The undersigned (and any director, officer, or employee) will not knowingly or negligently engage in the above-mentioned activities.

THIRD: The undersigned certifies that the statements contained herein are true, complete and correct to the best of such undersigned's knowledge and belief.

Date \_\_\_\_\_  
(firm) \_\_\_\_\_  
By: \_\_\_\_\_  
(title) \_\_\_\_\_

NOTE: See appendix C of this part for Privacy Act and Paperwork Reduction Act notices.

[57 FR 11830, Apr. 7, 1992; 57 FR 21855, May 22, 1992, as amended at 77 FR 39150, July 2, 2012]

#### APPENDIX C TO PART 2634—PRIVACY ACT AND PAPERWORK REDUCTION ACT NOTICES FOR APPENDIXES A AND B

##### PRIVACY ACT STATEMENT

Section 102(f) of the Ethics in Government Act of 1978 as amended (the "Ethics Act") (5 U.S.C. App.) and subpart D of 5 CFR part 2634 of the regulations of the Office of Government Ethics (OGE) require the reporting of this information for the administration of qualified trusts under the Ethics Act. The primary use of the information on this certificate is for review by Government officials of OGE and the agency of the Government employee for whom the trust is established to determine compliance with applicable Federal laws and regulations as regards qualified trusts. Additional disclosures of the information on this certificate may be made:

(1) to any requesting person in accordance with the access provisions of section 105 of the Ethics Act;

(2) to a Federal, State or local law enforcement agency if the disclosing agency becomes aware of a violation or potential violation of law or regulation;

(3) to a court or party in a court or Federal administrative proceeding if the Government is a party or in order to comply with a judge-issued subpoena;

(4) to a source when necessary to obtain information relevant to a conflict of interest issue;

(5) to the National Archives and Records Administration or the General Services Administration in records management inspections;

(6) to the Office of Management and Budget during legislative coordination on private relief legislation; and

(7) in response to a discovery request or for the appearance of a witness in a pending judicial or administrative proceeding, if the information is relevant to the subject matter.

Knowing or willful falsification of information on this certificate or failure to file or report information required to be reported under title I of the Ethics Act and 5 CFR part 2634 of the OGE regulations may lead to disqualification as a trustee or other fiduciary as well as possible disqualification of the underlying trust itself. Knowing and willful falsification of information required under the Ethics Act and the regulations may also subject you to criminal prosecution.

##### PUBLIC BURDEN INFORMATION AND PAPERWORK REDUCTION ACT STATEMENT

This collection of information is estimated to take an average of twenty minutes per response. You can send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: Deputy Director for Administration and Information Management, U.S. Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917. *Do not* send your completed certificate to that official; rather, send it to the Director of the Office of Government Ethics at that address as provided in the part 2634 regulation.

Pursuant to the Paperwork Reduction Act, as amended, an agency may not conduct or sponsor, and no person is required to respond to, a collection of information unless it displays a currently valid OMB control number (that number, 3209-0007, is displayed here and in the headings of the OGE model qualified trust certificates of independence and compliance, appendixes A and B to this part 2634).

[57 FR 11830, Apr. 7, 1992, as amended at 63 FR 58620, Nov. 2, 1998; 67 FR 22349, May 3, 2002]

#### PART 2635—STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH

##### Subpart A—General Provisions

Sec.

2635.101 Basic obligation of public service.

2635.102 Definitions.

2635.103 Applicability to members of the uniformed services.

## Office of Government Ethics

## § 2635.101

- 2635.104 Applicability to employees on detail.
- 2635.105 Supplemental agency regulations.
- 2635.106 Disciplinary and corrective action.
- 2635.107 Ethics advice.

### Subpart B—Gifts From Outside Sources

- 2635.201 Overview.
- 2635.202 General standards.
- 2635.203 Definitions.
- 2635.204 Exceptions.
- 2635.205 Proper disposition of prohibited gifts.

### Subpart C—Gifts Between Employees

- 2635.301 Overview.
- 2635.302 General standards.
- 2635.303 Definitions.
- 2635.304 Exceptions.

### Subpart D—Conflicting Financial Interests

- 2635.401 Overview.
- 2635.402 Disqualifying financial interests.
- 2635.403 Prohibited financial interests.

### Subpart E—Impartiality in Performing Official Duties

- 2635.501 Overview.
- 2635.502 Personal and business relationships.
- 2635.503 Extraordinary payments from former employers.

### Subpart F—Seeking Other Employment

- 2635.601 Overview.
- 2635.602 Applicability and related considerations.
- 2635.603 Definitions.
- 2635.604 Disqualification while seeking employment.
- 2635.605 Waiver or authorization permitting participation while seeking employment.
- 2635.606 Disqualification based on an arrangement concerning prospective employment or otherwise after negotiations.

### Subpart G—Misuse of Position

- 2635.701 Overview.
- 2635.702 Use of public office for private gain.
- 2635.703 Use of nonpublic information.
- 2635.704 Use of Government property.
- 2635.705 Use of official time.

### Subpart H—Outside Activities

- 2635.801 Overview.
- 2635.802 Conflicting outside employment and activities.
- 2635.803 Prior approval for outside employment and activities.

- 2635.804 Outside earned income limitations applicable to certain Presidential appointees and other noncareer employees.
- 2635.805 Service as an expert witness.
- 2635.806 Participation in professional associations. [Reserved]
- 2635.807 Teaching, speaking and writing.
- 2635.808 Fundraising activities.
- 2635.809 Just financial obligations.

### Subpart I—Related Statutory Authorities

- 2635.901 General.
- 2635.902 Related statutes.

AUTHORITY: 5 U.S.C. 7301, 7351, 7353; 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

SOURCE: 57 FR 35042, Aug. 7, 1992, unless otherwise noted.

## Subpart A—General Provisions

### § 2635.101 Basic obligation of public service.

(a) *Public service is a public trust.* Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in this section, as well as the implementing standards contained in this part and in supplemental agency regulations.

(b) *General principles.* The following general principles apply to every employee and may form the basis for the standards contained in this part. Where a situation is not covered by the standards set forth in this part, employees shall apply the principles set forth in this section in determining whether their conduct is proper.

(1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

(2) Employees shall not hold financial interests that conflict with the conscientious performance of duty.

(3) Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.

(4) An employee shall not, except as permitted by subpart B of this part, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or non-performance of the employee's duties.

(5) Employees shall put forth honest effort in the performance of their duties.

(6) Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.

(7) Employees shall not use public office for private gain.

(8) Employees shall act impartially and not give preferential treatment to any private organization or individual.

(9) Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.

(10) Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.

(11) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

(12) Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those—such as Federal, State, or local taxes—that are imposed by law.

(13) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.

(14) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

(c) *Related statutes.* In addition to the standards of ethical conduct set forth in this part, there are conflict of interest

statutes that prohibit certain conduct. Criminal conflict of interest statutes of general applicability to all employees, 18 U.S.C. 201, 203, 205, 208, and 209, are summarized in the appropriate subparts of this part and must be taken into consideration in determining whether conduct is proper. Citations to other generally applicable statutes relating to employee conduct are set forth in subpart I and employees are further cautioned that there may be additional statutory and regulatory restrictions applicable to them generally or as employees of their specific agencies. Because an employee is considered to be on notice of the requirements of any statute, an employee should not rely upon any description or synopsis of a statutory restriction, but should refer to the statute itself and obtain the advice of an agency ethics official as needed.

#### § 2635.102 Definitions.

The definitions listed below are used throughout this part. Additional definitions appear in the subparts or sections of subparts to which they apply. For purposes of this part:

(a) *Agency* means an executive agency as defined in 5 U.S.C. 105 and the Postal Service and the Postal Rate Commission. It does not include the General Accounting Office or the Government of the District of Columbia.

(b) *Agency designee* refers to any employee who, by agency regulation, instruction, or other issuance, has been delegated authority to make any determination, give any approval, or take any other action required or permitted by this part with respect to another employee. An agency may delegate these authorities to any number of agency designees necessary to ensure that determinations are made, approvals are given, and other actions are taken in a timely and responsible manner. Any provision that requires a determination, approval, or other action by the agency designee shall, where the conduct in issue is that of the agency head, be deemed to require that such determination, approval or action be made or taken by the agency head in consultation with the designated agency ethics official.

(c) *Agency ethics official* refers to the designated agency ethics official or to the alternate designated agency ethics official, referred to in § 2638.202(b) of this chapter, and to any deputy ethics official, described in § 2638.204 of this chapter, who has been delegated authority to assist in carrying out the responsibilities of the designated agency ethics official.

(d) *Agency programs or operations* refers to any program or function carried out or performed by an agency, whether pursuant to statute, Executive order, or regulation.

(e) *Corrective action* includes any action necessary to remedy a past violation or prevent a continuing violation of this part, including but not limited to restitution, change of assignment, disqualification, divestiture, termination of an activity, waiver, the creation of a qualified diversified or blind trust, or counseling.

(f) *Designated agency ethics official* refers to the official designated under § 2638.201 of this chapter.

(g) *Disciplinary action* includes those disciplinary actions referred to in Office of Personnel Management regulations and instructions implementing provisions of title 5 of the United States Code or provided for in comparable provisions applicable to employees not subject to title 5, including but not limited to reprimand, suspension, demotion, and removal. In the case of a military officer, comparable provisions may include those in the Uniform Code of Military Justice.

(h) *Employee* means any officer or employee of an agency, including a special Government employee. It includes officers but not enlisted members of the uniformed services. It includes employees of a State or local government or other organization who are serving on detail to an agency, pursuant to 5 U.S.C. 3371, *et seq.* For purposes other than subparts B and C of this part, it does not include the President or Vice President. Status as an employee is unaffected by pay or leave status or, in the case of a special Government employee, by the fact that the individual does not perform official duties on a given day.

(i) *Head of an agency* means, in the case of an agency headed by more than

one person, the chair or comparable member of such agency.

(j) *He, his, and him* include she, hers and her.

(k) *Person* means an individual, corporation and subsidiaries it controls, company, association, firm, partnership, society, joint stock company, or any other organization or institution, including any officer, employee, or agent of such person or entity. For purposes of this part, a corporation will be deemed to control a subsidiary if it owns 50 percent or more of the subsidiary's voting securities. The term is all-inclusive and applies to commercial ventures and nonprofit organizations as well as to foreign, State, and local governments, including the Government of the District of Columbia. It does not include any agency or other entity of the Federal Government or any officer or employee thereof when acting in his official capacity on behalf of that agency or entity.

(l) *Special Government employee* means those executive branch officers or employees specified in 18 U.S.C. 202(a). A special Government employee is retained, designated, appointed, or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for a period not to exceed 130 days during any consecutive 365-day period.

(m) *Supplemental agency regulation* means a regulation issued pursuant to § 2635.105.

[57 FR 35042, Aug. 7, 1992, as amended at 71 FR 45736, Aug. 10, 2006]

#### **§ 2635.103 Applicability to members of the uniformed services.**

The provisions of this part, except this section, are not applicable to enlisted members of the uniformed services. Each agency with jurisdiction over enlisted members of the uniformed services shall issue regulations defining the ethical conduct obligations of enlisted members under its jurisdiction. Those regulations shall be consistent with Executive Order 12674, April 12, 1989, as modified, and may prescribe the full range of statutory and regulatory sanctions, including those available under the Uniform Code of Military Justice, for failure to comply with such regulations.

**§ 2635.104 Applicability to employees on detail.**

(a) *Details to other agencies.* Except as provided in paragraph (d) of this section, an employee on detail, including a uniformed officer on assignment, from his employing agency to another agency for a period in excess of 30 calendar days shall be subject to any supplemental agency regulations of the agency to which he is detailed rather than to any supplemental agency regulations of his employing agency.

(b) *Details to the legislative or judicial branch.* An employee on detail, including a uniformed officer on assignment, from his employing agency to the legislative or judicial branch for a period in excess of 30 calendar days shall be subject to the ethical standards of the branch or entity to which detailed. For the duration of any such detail or assignment, the employee shall not be subject to the provisions of this part, except this section, or, except as provided in paragraph (d) of this section, to any supplemental agency regulations of his employing agency, but shall remain subject to the conflict of interest prohibitions in title 18 of the United States Code.

(c) *Details to non-Federal entities.* Except to the extent exempted in writing pursuant to this paragraph, an employee detailed to a non-Federal entity remains subject to this part and to any supplemental agency regulation of his employing agency. When an employee is detailed pursuant to statutory authority to an international organization or to a State or local government for a period in excess of six months, the designated agency ethics official may grant a written exemption from subpart B of this part based on his determination that the entity has adopted written ethical standards covering solicitation and acceptance of gifts which will apply to the employee during the detail and which will be appropriate given the purpose of the detail.

(d) *Applicability of special agency statutes.* Notwithstanding paragraphs (a) and (b) of this section, an employee who is subject to an agency statute which restricts his activities or financial holdings specifically because of his status as an employee of that agency shall continue to be subject to any provisions in the supplemental agency regulations of his employing agency that implement that statute.

visions in the supplemental agency regulations of his employing agency that implement that statute.

**§ 2635.105 Supplemental agency regulations.**

In addition to the regulations set forth in this part, an employee shall comply with any supplemental agency regulations issued by his employing agency under this section.

(a) An agency that wishes to supplement this part shall prepare and submit to the Office of Government Ethics, for its concurrence and joint issuance, any agency regulations that supplement the regulations contained in this part. Supplemental agency regulations which the agency determines are necessary and appropriate, in view of its programs and operations, to fulfill the purposes of this part shall be:

(1) In the form of a supplement to the regulations in this part; and

(2) In addition to the substantive provisions of this part.

(b) After concurrence and co-signature by the Office of Government Ethics, the agency shall submit its supplemental agency regulations to the FEDERAL REGISTER for publication and codification at the expense of the agency in title 5 of the Code of Federal Regulations. Supplemental agency regulations issued under this section are effective only after concurrence and co-signature by the Office of Government Ethics and publication in the FEDERAL REGISTER.

(c) This section applies to any supplemental agency regulations or amendments thereof issued under this part. It does not apply to:

(1) A handbook or other issuance intended merely as an explanation of the standards contained in this part or in supplemental agency regulations;

(2) An instruction or other issuance the purpose of which is to:

(i) Delegate to an agency designee authority to make any determination, give any approval or take any other action required or permitted by this part or by supplemental agency regulations; or

(ii) Establish internal agency procedures for documenting or processing any determination, approval or other action required or permitted by this

part or by supplemental agency regulations, or for retaining any such documentation; or

(3) Regulations or instructions that an agency has authority, independent of this part, to issue, such as regulations implementing an agency's gift acceptance statute, protecting categories of nonpublic information or establishing standards for use of Government vehicles. Where the content of any such regulations or instructions was included in the agency's standards of conduct regulations issued pursuant to Executive Order 11222 and the Office of Government Ethics concurs that they need not be issued as part of an agency's supplemental agency regulations, those regulations or instructions may be promulgated separately from the agency's supplemental agency regulations.

(d) Employees of a State or local government or other organization who are serving on detail to an agency, pursuant to 5 U.S.C. 3371, *et seq.*, are subject to any requirements, in addition to those in this part, established by a supplemental agency regulation issued under this section to the extent that such regulation expressly provides.

[57 FR 35042, Aug. 7, 1992, as amended at 71 FR 45736, Aug. 10, 2006]

#### § 2635.106 Disciplinary and corrective action.

(a) Except as provided in § 2635.107, a violation of this part or of supplemental agency regulations may be cause for appropriate corrective or disciplinary action to be taken under applicable Governmentwide regulations or agency procedures. Such action may be in addition to any action or penalty prescribed by law.

(b) It is the responsibility of the employing agency to initiate appropriate disciplinary or corrective action in individual cases. However, corrective action may be ordered or disciplinary action recommended by the Director of the Office of Government Ethics under the procedures at part 2638 of this chapter.

(c) A violation of this part or of supplemental agency regulations, as such, does not create any right or benefit, substantive or procedural, enforceable at law by any person against the

United States, its agencies, its officers or employees, or any other person. Thus, for example, an individual who alleges that an employee has failed to adhere to laws and regulations that provide equal opportunity regardless of race, color, religion, sex, national origin, age, or handicap is required to follow applicable statutory and regulatory procedures, including those of the Equal Employment Opportunity Commission.

#### § 2635.107 Ethics advice.

(a) As required by §§ 2638.201 and 2638.202(b) of this chapter, each agency has a designated agency ethics official who, on the agency's behalf, is responsible for coordinating and managing the agency's ethics program, as well as an alternate. The designated agency ethics official has authority under § 2638.204 of this chapter to delegate certain responsibilities, including that of providing ethics counseling regarding the application of this part, to one or more deputy ethics officials.

(b) Employees who have questions about the application of this part or any supplemental agency regulations to particular situations should seek advice from an agency ethics official. Disciplinary action for violating this part or any supplemental agency regulations will not be taken against an employee who has engaged in conduct in good faith reliance upon the advice of an agency ethics official, provided that the employee, in seeking such advice, has made full disclosure of all relevant circumstances. Where the employee's conduct violates a criminal statute, reliance on the advice of an agency ethics official cannot ensure that the employee will not be prosecuted under that statute. However, good faith reliance on the advice of an agency ethics official is a factor that may be taken into account by the Department of Justice in the selection of cases for prosecution. Disclosures made by an employee to an agency ethics official are not protected by an attorney-client privilege. An agency ethics official is required by 28 U.S.C. 535 to report any information he receives relating to a violation of the criminal code, title 18 of the United States Code.

## Subpart B—Gifts From Outside Sources

### § 2635.201 Overview.

This subpart contains standards that prohibit an employee from soliciting or accepting any gift from a prohibited source or given because of the employee's official position unless the item is excluded from the definition of a gift or falls within one of the exceptions set forth in this subpart.

### § 2635.202 General standards.

(a) *General prohibitions.* Except as provided in this subpart, an employee shall not, directly or indirectly, solicit or accept a gift:

- (1) From a prohibited source; or
- (2) Given because of the employee's official position.

(b) *Relationship to illegal gratuities statute.* Unless accepted in violation of paragraph (c)(1) of this section, a gift accepted under the standards set forth in this subpart shall not constitute an illegal gratuity otherwise prohibited by 18 U.S.C. 201(c)(1)(B).

(c) *Limitations on use of exceptions.* Notwithstanding any exception provided in this subpart, other than § 2635.204(j), an employee shall not:

- (1) Accept a gift in return for being influenced in the performance of an official act;
- (2) Solicit or coerce the offering of a gift;
- (3) Accept gifts from the same or different sources on a basis so frequent that a reasonable person would be led to believe the employee is using his public office for private gain;

*Example 1:* A purchasing agent for a Veterans Administration hospital routinely deals with representatives of pharmaceutical manufacturers who provide information about new company products. Because of his crowded calendar, the purchasing agent has offered to meet with manufacturer representatives during his lunch hours Tuesdays through Thursdays and the representatives routinely arrive at the employee's office bringing a sandwich and a soft drink for the employee. Even though the market value of each of the lunches is less than \$6 and the aggregate value from any one manufacturer does not exceed the \$50 aggregate limitation in § 2635.204(a) on de minimis gifts of \$20 or less, the practice of accepting even these

modest gifts on a recurring basis is improper.

(4) Accept a gift in violation of any statute. Relevant statutes applicable to all employees include:

(i) 18 U.S.C. 201(b), which prohibits a public official from seeking, accepting, or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act or for being induced to take or omit to take any action in violation of his official duty. As used in 18 U.S.C. 201(b), the term "public official" is broadly construed and includes regular and special Government employees as well as all other Government officials; and

(ii) 18 U.S.C. 209, which prohibits an employee, other than a special Government employee, from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a Government employee. The statute contains several specific exceptions to this general prohibition, including an exception for contributions made from the treasury of a State, county, or municipality; or

(5) Accept vendor promotional training contrary to applicable regulations, policies or guidance relating to the procurement of supplies and services for the Government, except pursuant to § 2635.204(1).

[57 FR 35041, Aug. 7, 1992; 57 FR 48557, Oct. 27, 1992, as amended at 62 FR 48747, Sept. 17, 1997]

### § 2635.203 Definitions.

For purposes of this subpart, the following definitions shall apply:

(a) *Agency* has the meaning set forth in § 2635.102(a). However, for purposes of this subpart, an executive department, as defined in 5 U.S.C. 101, may, by supplemental agency regulation, designate as a separate agency any component of that department which the department determines exercises distinct and separate functions.

(b) *Gift* includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of training, transportation, local travel, lodgings and meals, whether provided in-kind, by



## Office of Government Ethics

## § 2635.203

purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred. It does not include:

(1) Modest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal;

(2) Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation;

(3) Loans from banks and other financial institutions on terms generally available to the public;

(4) Opportunities and benefits, including favorable rates and commercial discounts, available to the public or to a class consisting of all Government employees or all uniformed military personnel, whether or not restricted on the basis of geographic considerations;

(5) Rewards and prizes given to competitors in contests or events, including random drawings, open to the public unless the employee's entry into the contest or event is required as part of his official duties;

(6) Pension and other benefits resulting from continued participation in an employee welfare and benefits plan maintained by a former employer;

(7) Anything which is paid for by the Government or secured by the Government under Government contract;

NOTE: Some airlines encourage those purchasing tickets to join programs that award free flights and other benefits to frequent fliers. Any such benefit earned on the basis of Government-financed travel belongs to the agency rather than to the employee and may be accepted only insofar as provided under 41 CFR 301-53.

(8) Any gift accepted by the Government under specific statutory authority, including:

(i) Travel, subsistence, and related expenses accepted by an agency under the authority of 31 U.S.C. 1353 in connection with an employee's attendance at a meeting or similar function relating to his official duties which takes place away from his duty station. The agency's acceptance must be in accordance with the implementing regulations at 41 CFR part 304-1; and

(ii) Other gifts provided in-kind which have been accepted by an agency

under its agency gift acceptance statute; or

(9) Anything for which market value is paid by the employee.

(c) *Market value* means the retail cost the employee would incur to purchase the gift. An employee who cannot ascertain the market value of a gift may estimate its market value by reference to the retail cost of similar items of like quality. The market value of a gift of a ticket entitling the holder to food, refreshments, entertainment, or any other benefit shall be the face value of the ticket.

*Example 1:* An employee who has been given an acrylic paperweight embedded with the corporate logo of a prohibited source may determine its market value based on her observation that a comparable acrylic paperweight, not embedded with a logo, generally sells for about \$20.

*Example 2:* A prohibited source has offered an employee a ticket to a charitable event consisting of a cocktail reception to be followed by an evening of chamber music. Even though the food, refreshments, and entertainment provided at the event may be worth only \$20, the market value of the ticket is its \$250 face value.

(d) *Prohibited source* means any person who:

(1) Is seeking official action by the employee's agency;

(2) Does business or seeks to do business with the employee's agency;

(3) Conducts activities regulated by the employee's agency;

(4) Has interests that may be substantially affected by performance or nonperformance of the employee's official duties; or

(5) Is an organization a majority of whose members are described in paragraphs (d) (1) through (4) of this section.

(e) A gift is solicited or accepted because of the employee's official position if it is from a person other than an employee and would not have been solicited, offered, or given had the employee not held the status, authority or duties associated with his Federal position.

NOTE: Gifts between employees are subject to the limitations set forth in subpart C of this part.

*Example 1:* Where free season tickets are offered by an opera guild to all members of the

Cabinet, the gift is offered because of their official positions.

*Example 2:* Employees at a regional office of the Department of Justice (DOJ) work in Government-leased space at a private office building, along with various private business tenants. A major fire in the building during normal office hours causes a traumatic experience for all occupants of the building in making their escape, and it is the subject of widespread news coverage. A corporate hotel chain, which does not meet the definition of a prohibited source for DOJ, seizes the moment and announces that it will give a free night's lodging to all building occupants and their families, as a public goodwill gesture. Employees of DOJ may accept, as this gift is not being given because of their Government positions. The donor's motivation for offering this gift is unrelated to the DOJ employees' status, authority or duties associated with their Federal position, but instead is based on their mere presence in the building as occupants at the time of the fire.

(f) A gift which is solicited or accepted indirectly includes a gift:

(1) Given with the employee's knowledge and acquiescence to his parent, sibling, spouse, child, or dependent relative because of that person's relationship to the employee, or

(2) Given to any other person, including any charitable organization, on the basis of designation, recommendation, or other specification by the employee, except as permitted for the disposition of perishable items by § 2635.205(a)(2).

*Example 1:* An employee who must decline a gift of a personal computer pursuant to this subpart may not suggest that the gift be given instead to one of five charitable organizations whose names are provided by the employee.

(g) *Vendor promotional training* means training provided by any person for the purpose of promoting its products or services. It does not include training provided under a Government contract or by a contractor to facilitate use of products or services it furnishes under a Government contract.

[57 FR 35042, Aug. 7, 1992, as amended at 60 FR 51667, Oct. 3, 1995; 63 FR 69993, Dec. 18, 1998; 64 FR 2422, Jan. 14, 1999; 72 FR 16986, Apr. 6, 2007]

#### § 2635.204 Exceptions.

The prohibitions set forth in § 2635.202(a) do not apply to a gift accepted under the circumstances described in paragraphs (a) through (1) of

this section, and an employee's acceptance of a gift in accordance with one of those paragraphs will be deemed not to violate the principles set forth in § 2635.101(b), including appearances. Even though acceptance of a gift may be permitted by one of the exceptions contained in paragraphs (a) through (1) of this section, it is never inappropriate and frequently prudent for an employee to decline a gift offered by a prohibited source or because of his official position.

(a) *Gifts of \$20 or less.* An employee may accept unsolicited gifts having an aggregate market value of \$20 or less per source per occasion, provided that the aggregate market value of individual gifts received from any one person under the authority of this paragraph shall not exceed \$50 in a calendar year. This exception does not apply to gifts of cash or of investment interests such as stock, bonds, or certificates of deposit. Where the market value of a gift or the aggregate market value of gifts offered on any single occasion exceeds \$20, the employee may not pay the excess value over \$20 in order to accept that portion of the gift or those gifts worth \$20. Where the aggregate value of tangible items offered on a single occasion exceeds \$20, the employee may decline any distinct and separate item in order to accept those items aggregating \$20 or less.

*Example 1:* An employee of the Securities and Exchange Commission and his spouse have been invited by a representative of a regulated entity to a Broadway play, tickets to which have a face value of \$30 each. The aggregate market value of the gifts offered on this single occasion is \$60, \$40 more than the \$20 amount that may be accepted for a single event or presentation. The employee may not accept the gift of the evening of entertainment. He and his spouse may attend the play only if he pays the full \$60 value of the two tickets.

*Example 2:* An employee of the Defense Mapping Agency has been invited by an association of cartographers to speak about his agency's role in the evolution of missile technology. At the conclusion of his speech, the association presents the employee a framed map with a market value of \$18 and a book about the history of cartography with a market value of \$15. The employee may accept the map or the book, but not both, since the aggregate value of these two tangible items exceeds \$20.

*Example 3:* On four occasions during the calendar year, an employee of the Defense Logistics Agency was given gifts worth \$10 each by four employees of a corporation that is a DLA contractor. For purposes of applying the yearly \$50 limitation on gifts of \$20 or less from any one person, the four gifts must be aggregated because a person is defined at § 2635.102(k) to mean not only the corporate entity, but its officers and employees as well. However, for purposes of applying the \$50 aggregate limitation, the employee would not have to include the value of a birthday present received from his cousin, who is employed by the same corporation, if he can accept the birthday present under the exception at § 2635.204(b) for gifts based on a personal relationship.

*Example 4:* Under the authority of 31 U.S.C. 1353 for agencies to accept payments from non-Federal sources in connection with attendance at certain meetings or similar functions, the Environmental Protection Agency has accepted an association's gift of travel expenses and conference fees for an employee of its Office of Radiation Programs to attend an international conference on "The Chernobyl Experience." While at the conference, the employee may accept a gift of \$20 or less from the association or from another person attending the conference even though it was not approved in advance by the EPA. Although 31 U.S.C. 1353 is the only authority under which an agency may accept gifts from certain non-Federal sources in connection with its employees' attendance at such functions, a gift of \$20 or less accepted under § 2635.204(a) is a gift to the employee rather than to his employing agency.

*Example 5:* During off-duty time, an employee of the Department of Defense (DOD) attends a trade show involving companies that are DOD contractors. He is offered a \$15 computer program disk at X Company's booth, a \$12 appointments calendar at Y Company's booth, and a deli lunch worth \$8 from Z Company. The employee may accept all three of these items because they do not exceed \$20 per source, even though they total more than \$20 at this single occasion.

(b) *Gifts based on a personal relationship.* An employee may accept a gift given under circumstances which make it clear that the gift is motivated by a family relationship or personal friendship rather than the position of the employee. Relevant factors in making such a determination include the history of the relationship and whether the family member or friend personally pays for the gift.

*Example 1:* An employee of the Federal Deposit Insurance Corporation has been dating

a secretary employed by a member bank. For Secretary's Week, the bank has given each secretary 2 tickets to an off-Broadway musical review and has urged each to invite a family member or friend to share the evening of entertainment. Under the circumstances, the FDIC employee may accept his girlfriend's invitation to the theater. Even though the tickets were initially purchased by the member bank, they were given without reservation to the secretary to use as she wished, and her invitation to the employee was motivated by their personal friendship.

*Example 2:* Three partners in a law firm that handles corporate mergers have invited an employee of the Federal Trade Commission to join them in a golf tournament at a private club at the firm's expense. The entry fee is \$500 per foursome. The employee cannot accept the gift of one-quarter of the entry fee even though he and the three partners have developed an amicable relationship as a result of the firm's dealings with the FTC. As evidenced in part by the fact that the fees are to be paid by the firm, it is not a personal friendship but a business relationship that is the motivation behind the partners' gift.

(c) *Discounts and similar benefits.* In addition to those opportunities and benefits excluded from the definition of a gift by § 2635.203(b)(4), an employee may accept:

(1) Reduced membership or other fees for participation in organization activities offered to all Government employees or all uniformed military personnel by professional organizations if the only restrictions on membership relate to professional qualifications; and

(2) Opportunities and benefits, including favorable rates and commercial discounts not precluded by paragraph (c)(3) of this section:

(i) Offered to members of a group or class in which membership is unrelated to Government employment;

(ii) Offered to members of an organization, such as an employees' association or agency credit union, in which membership is related to Government employment if the same offer is broadly available to large segments of the public through organizations of similar size; or

(iii) Offered by a person who is not a prohibited source to any group or class that is not defined in a manner that specifically discriminates among Government employees on the basis of type

of official responsibility or on a basis that favors those of higher rank or rate of pay; provided, however, that

(3) An employee may not accept for personal use any benefit to which the Government is entitled as the result of an expenditure of Government funds.

*Example 1:* An employee of the Consumer Product Safety Commission may accept a discount of \$50 on a microwave oven offered by the manufacturer to all members of the CPSC employees' association. Even though the CPSC is currently conducting studies on the safety of microwave ovens, the \$50 discount is a standard offer that the manufacturer has made broadly available through a number of similar organizations to large segments of the public.

*Example 2:* An Assistant Secretary may not accept a local country club's offer of membership to all members of Department Secretariats which includes a waiver of its \$5,000 membership initiation fee. Even though the country club is not a prohibited source, the offer discriminates in favor of higher ranking officials.

*Example 3:* The administrative officer for a district office of the Immigration and Naturalization Service has signed an INS order to purchase 50 boxes of photocopy paper from a supplier whose literature advertises that it will give a free briefcase to anyone who purchases 50 or more boxes. Because the paper was purchased with INS funds, the administrative officer cannot keep the briefcase which, if claimed and received, is Government property.

(d) *Awards and honorary degrees.* (1) An employee may accept gifts, other than cash or an investment interest, with an aggregate market value of \$200 or less if such gifts are a bona fide award or incident to a bona fide award that is given for meritorious public service or achievement by a person who does not have interests that may be substantially affected by the performance or nonperformance of the employee's official duties or by an association or other organization the majority of whose members do not have such interests. Gifts with an aggregate market value in excess of \$200 and awards of cash or investment interests offered by such persons as awards or incidents of awards that are given for these purposes may be accepted upon a written determination by an agency ethics official that the award is made as part of an established program of recognition:

(i) Under which awards have been made on a regular basis or which is

funded, wholly or in part, to ensure its continuation on a regular basis; and

(ii) Under which selection of award recipients is made pursuant to written standards.

(2) An employee may accept an honorary degree from an institution of higher education as defined at 20 U.S.C. 1141(a) based on a written determination by an agency ethics official that the timing of the award of the degree would not cause a reasonable person to question the employee's impartiality in a matter affecting the institution.

(3) An employee who may accept an award or honorary degree pursuant to paragraph (d)(1) or (2) of this section may also accept meals and entertainment given to him and to members of his family at the event at which the presentation takes place.

*Example 1:* Based on a determination by an agency ethics official that the prize meets the criteria set forth in § 2635.204(d)(1), an employee of the National Institutes of Health may accept the Nobel Prize for Medicine, including the cash award which accompanies the prize, even though the prize was conferred on the basis of laboratory work performed at NIH.

*Example 2:* Prestigious University wishes to give an honorary degree to the Secretary of Labor. The Secretary may accept the honorary degree only if an agency ethics official determines in writing that the timing of the award of the degree would not cause a reasonable person to question the Secretary's impartiality in a matter affecting the university.

*Example 3:* An ambassador selected by a nonprofit organization as recipient of its annual award for distinguished service in the interest of world peace may, together with his wife, and children, attend the awards ceremony dinner and accept a crystal bowl worth \$200 presented during the ceremony. However, where the organization has also offered airline tickets for the ambassador and his family to travel to the city where the awards ceremony is to be held, the aggregate value of the tickets and the crystal bowl exceeds \$200 and he may accept only upon a written determination by the agency ethics official that the award is made as part of an established program of recognition.

(e) *Gifts based on outside business or employment relationships.* An employee may accept meals, lodgings, transportation and other benefits:

(1) Resulting from the business or employment activities of an employee's spouse when it is clear that such

benefits have not been offered or enhanced because of the employee's official position;

*Example 1:* A Department of Agriculture employee whose husband is a computer programmer employed by an Agriculture Department contractor may attend the company's annual retreat for all of its employees and their families held at a resort facility. However, under § 2635.502, the employee may be disqualified from performing official duties affecting her husband's employer.

*Example 2:* Where the spouses of other clerical personnel have not been invited, an employee of the Defense Contract Audit Agency whose wife is a clerical worker at a defense contractor may not attend the contractor's annual retreat in Hawaii for corporate officers and members of the board of directors, even though his wife received a special invitation for herself and her spouse.

(2) Resulting from his outside business or employment activities when it is clear that such benefits have not been offered or enhanced because of his official status; or

*Example 1:* The members of an Army Corps of Engineers environmental advisory committee that meets 6 times per year are special Government employees. A member who has a consulting business may accept an invitation to a \$50 dinner from her corporate client, an Army construction contractor, unless, for example, the invitation was extended in order to discuss the activities of the committee.

(3) Customarily provided by a prospective employer in connection with bona fide employment discussions. If the prospective employer has interests that could be affected by performance or nonperformance of the employee's duties, acceptance is permitted only if the employee first has complied with the disqualification requirements of subpart F of this part applicable when seeking employment.

*Example 1:* An employee of the Federal Communications Commission with responsibility for drafting regulations affecting all cable television companies wishes to apply for a job opening with a cable television holding company. Once she has properly disqualified herself from further work on the regulations as required by subpart F of this part, she may enter into employment discussions with the company and may accept the company's offer to pay for her airfare, hotel and meals in connection with an interview trip.

(4) For purposes of paragraphs (e)(1) through (3) of this section, employment shall have the meaning set forth in § 2635.603(a).

(f) *Gifts in connection with political activities permitted by the Hatch Act Reform Amendments.* An employee who, in accordance with the Hatch Act Reform Amendments of 1993, at 5 U.S.C. 7323, may take an active part in political management or in political campaigns, may accept meals, lodgings, transportation and other benefits, including free attendance at events, when provided, in connection with such active participation, by a political organization described in 26 U.S.C. 527(e). Any other employee, such as a security officer, whose official duties require him to accompany an employee to a political event may accept meals, free attendance and entertainment provided at the event by such an organization.

*Example 1:* The Secretary of the Department of Health and Human Services may accept an airline ticket and hotel accommodations furnished by the campaign committee of a candidate for the United States Senate in order to give a speech in support of the candidate.

(g) *Widely attended gatherings and other events—(1) Speaking and similar engagements.* When an employee is assigned to participate as a speaker or panel participant or otherwise to present information on behalf of the agency at a conference or other event, his acceptance of an offer of free attendance at the event on the day of his presentation is permissible when provided by the sponsor of the event. The employee's participation in the event on that day is viewed as a customary and necessary part of his performance of the assignment and does not involve a gift to him or to the agency.

(2) *Widely attended gatherings.* When there has been a determination that his attendance is in the interest of the agency because it will further agency programs and operations, an employee may accept an unsolicited gift of free attendance at all or appropriate parts of a widely attended gathering of mutual interest to a number of parties from the sponsor of the event or, if more than 100 persons are expected to attend the event and the gift of free attendance has a market value of \$375 or

less, from a person other than the sponsor of the event. A gathering is widely attended if it is expected that a large number of persons will attend and that persons with a diversity of views or interests will be present, for example, if it is open to members from throughout the interested industry or profession or if those in attendance represent a range of persons interested in a given matter. For employees subject to a leave system, attendance at the event shall be on the employee's own time or, if authorized by the employee's agency, on excused absence pursuant to applicable guidelines for granting such absence, or otherwise without charge to the employee's leave account.

(3) *Determination of agency interest.* The determination of agency interest required by paragraph (g)(2) of this section shall be made orally or in writing by the agency designee.

(i) If the person who has extended the invitation has interests that may be substantially affected by the performance or nonperformance of an employee's official duties or is an association or organization the majority of whose members have such interests, the employee's participation may be determined to be in the interest of the agency only where there is a written finding by the agency designee that the agency's interest in the employee's participation in the event outweighs the concern that acceptance of the gift of free attendance may or may appear to improperly influence the employee in the performance of his official duties. Relevant factors that should be considered by the agency designee include the importance of the event to the agency, the nature and sensitivity of any pending matter affecting the interests of the person who has extended the invitation, the significance of the employee's role in any such matter, the purpose of the event, the identity of other expected participants and the market value of the gift of free attendance.

(ii) A blanket determination of agency interest may be issued to cover all or any category of invitees other than those as to whom the finding is required by paragraph (g)(3)(i) of this section. Where a finding under paragraph

(g)(3)(i) of this section is required, a written determination of agency interest, including the necessary finding, may be issued to cover two or more employees whose duties similarly affect the interests of the person who has extended the invitation or, where that person is an association or organization, of its members.

(4) *Free attendance.* For purposes of paragraphs (g)(1) and (g)(2) of this section, free attendance may include waiver of all or part of a conference or other fee or the provision of food, refreshments, entertainment, instruction and materials furnished to all attendees as an integral part of the event. It does not include travel expenses, lodgings, entertainment collateral to the event, or meals taken other than in a group setting with all other attendees. Where the invitation has been extended to an accompanying spouse or other guest (see paragraph (g)(6) of this section), the market value of the gift of free attendance includes the market value of free attendance by the spouse or other guest as well as the market value of the employee's own attendance.

NOTE: There are statutory authorities implemented other than by part 2635 under which an agency or an employee may be able to accept free attendance or other items not included in the definition of free attendance, such as travel expenses.

(5) *Cost provided by sponsor of event.* The cost of the employee's attendance will not be considered to be provided by the sponsor, and the invitation is not considered to be from the sponsor of the event, where a person other than the sponsor designates the employee to be invited and bears the cost of the employee's attendance through a contribution or other payment intended to facilitate that employee's attendance. Payment of dues or a similar assessment to a sponsoring organization does not constitute a payment intended to facilitate a particular employee's attendance.

(6) *Accompanying spouse or other guest.* When others in attendance will generally be accompanied by a spouse or other guest, and where the invitation is from the same person who has invited the employee, the agency designee may authorize an employee to

accept an unsolicited invitation of free attendance to an accompanying spouse or to another accompanying guest to participate in all or a portion of the event at which the employee's free attendance is permitted under paragraph (g)(1) or (g)(2) of this section. The authorization required by this paragraph may be provided orally or in writing.

*Example 1:* An aerospace industry association that is a prohibited source sponsors an industrywide, two-day seminar for which it charges a fee of \$400 and anticipates attendance of approximately 400. An Air Force contractor pays \$2,000 to the association so that the association can extend free invitations to five Air Force officials designated by the contractor. The Air Force officials may not accept the gifts of free attendance. Because the contractor specified the invitees and bore the cost of their attendance, the gift of free attendance is considered to be provided by the company and not by the sponsoring association. Had the contractor paid \$2,000 to the association in order that the association might invite any five Federal employees, an Air Force official to whom the sponsoring association extended one of the five invitations could attend if his participation were determined to be in the interest of the agency. The Air Force official could not in any case accept an invitation directly from the non-sponsor contractor because the market value of the gift exceeds \$375.

*Example 2:* An employee of the Department of Transportation is invited by a news organization to an annual press dinner sponsored by an association of press organizations. Tickets for the event cost \$375 per person and attendance is limited to 400 representatives of press organizations and their guests. If the employee's attendance is determined to be in the interest of the agency, she may accept the invitation from the news organization because more than 100 persons will attend and the cost of the ticket does not exceed \$375. However, if the invitation were extended to the employee and an accompanying guest, her guest could not be authorized to attend for free since the market value of the gift of free attendance would be \$750 and the invitation is from a person other than the sponsor of the event.

*Example 3:* An employee of the Department of Energy (DOE) and his wife have been invited by a major utility executive to a small dinner party. A few other officials of the utility and their spouses or other guests are also invited, as is a representative of a consumer group concerned with utility rates and her husband. The DOE official believes the dinner party will provide him an opportunity to socialize with and get to know those in attendance. The employee may not accept the free invitation under this excep-

tion, even if his attendance could be determined to be in the interest of the agency. The small dinner party is not a widely attended gathering. Nor could the employee be authorized to accept even if the event were instead a corporate banquet to which forty company officials and their spouses or other guests were invited. In this second case, notwithstanding the larger number of persons expected (as opposed to the small dinner party just noted) and despite the presence of the consumer group representative and her husband who are not officials of the utility, those in attendance would still not represent a diversity of views or interests. Thus, the company banquet would not qualify as a widely attended gathering under those circumstances either.

*Example 4:* An employee of the Department of the Treasury authorized to participate in a panel discussion of economic issues as part of a one-day conference may accept the sponsor's waiver of the conference fee. Under the separate authority of § 2635.204(a), he may accept a token of appreciation for his speech having a market value of \$20 or less.

*Example 5:* An Assistant U.S. Attorney is invited to attend a luncheon meeting of a local bar association to hear a distinguished judge lecture on cross-examining expert witnesses. Although members of the bar association are assessed a \$15 fee for the meeting, the Assistant U.S. Attorney may accept the bar association's offer to attend for free, even without a determination of agency interest. The gift can be accepted under the \$20 de minimis exception at § 2635.204(a).

*Example 6:* An employee of the Department of the Interior authorized to speak on the first day of a four-day conference on endangered species may accept the sponsor's waiver of the conference fee for the first day of the conference. If the conference is widely attended, he may be authorized, based on a determination that his attendance is in the agency's interest, to accept the sponsor's offer to waive the attendance fee for the remainder of the conference.

(h) *Social invitations from persons other than prohibited sources.* An employee may accept food, refreshments and entertainment, not including travel or lodgings, at a social event attended by several persons where:

- (1) The invitation is from a person who is not a prohibited source; and
- (2) No fee is charged to any person in attendance.

*Example 1:* Along with several other Government officials and a number of individuals from the private sector, the Administrator of the Environmental Protection Agency has been invited to the premier

showing of a new adventure movie about industrial espionage. The producer is paying all costs of the showing. The Administrator may accept the invitation since the producer is not a prohibited source and no attendance fee is being charged to anyone who has been invited.

*Example 2:* An employee of the White House Press Office has been invited to a cocktail party given by a noted Washington hostess who is not a prohibited source. The employee may attend even though he has only recently been introduced to the hostess and suspects that he may have been invited because of his official position.

(i) *Meals, refreshments and entertainment in foreign areas.* An employee assigned to duty in, or on official travel to, a foreign area as defined in 41 CFR 301-7.3(c) may accept food, refreshments or entertainment in the course of a breakfast, luncheon, dinner or other meeting or event provided:

(1) The market value in the foreign area of the food, refreshments or entertainment provided at the meeting or event, as converted to U.S. dollars, does not exceed the per diem rate for the foreign area specified in the U.S. Department of State's Maximum Per Diem Allowances for Foreign Areas, Per Diem Supplement Section 925 to the Standardized Regulations (GC,FA) available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402;

(2) There is participation in the meeting or event by non-U.S. citizens or by representatives of foreign governments or other foreign entities;

(3) Attendance at the meeting or event is part of the employee's official duties to obtain information, disseminate information, promote the export of U.S. goods and services, represent the United States or otherwise further programs or operations of the agency or the U.S. mission in the foreign area; and

(4) The gift of meals, refreshments or entertainment is from a person other than a foreign government as defined in 5 U.S.C. 7342(a)(2).

*Example 1:* A number of local businessmen in a developing country are anxious for a U.S. company to locate a manufacturing facility in their province. An official of the Overseas Private Investment Corporation may accompany the visiting vice president of the U.S. company to a dinner meeting hosted by the businessmen at a province res-

taurant where the market value of the food and refreshments does not exceed the per diem rate for that country.

(j) *Gifts to the President or Vice President.* Because of considerations relating to the conduct of their offices, including those of protocol and etiquette, the President or the Vice President may accept any gift on his own behalf or on behalf of any family member, provided that such acceptance does not violate § 2635.202(c) (1) or (2), 18 U.S.C. 201(b) or 201(c)(3), or the Constitution of the United States.

(k) *Gifts authorized by supplemental agency regulation.* An employee may accept any gift the acceptance of which is specifically authorized by a supplemental agency regulation.

(l) *Gifts accepted under specific statutory authority.* The prohibitions on acceptance of gifts from outside sources contained in this subpart do not apply to any item, receipt of which is specifically authorized by statute. Gifts which may be received by an employee under the authority of specific statutes include, but are not limited to:

(1) Free attendance, course or meeting materials, transportation, lodgings, food and refreshments or reimbursements therefor incident to training or meetings when accepted by the employee under the authority of 5 U.S.C. 4111 from an organization with tax-exempt status under 26 U.S.C. 501(c)(3) or from a person to whom the prohibitions in 18 U.S.C. 209 do not apply. The employee's acceptance must be approved by the agency in accordance with part 410 of this title; or

NOTE: 26 U.S.C. 501(c)(3) is authority for tax-exempt treatment of a limited class of nonprofit organizations, including those organized and operated for charitable, religious or educational purposes. Many nonprofit organizations are not exempt from taxation under this section.

(2) Gifts from a foreign government or international or multinational organization, or its representative, when accepted by the employee under the authority of the Foreign Gifts and Decorations Act, 5 U.S.C. 7342. As a condition of acceptance, an employee must comply with requirements imposed by



## Office of Government Ethics

## § 2635.302

the agency's regulations or procedures implementing that Act.

[57 FR 35041, Aug. 7, 1992; 57 FR 48557, Oct. 27, 1992; 61 FR 42969, Aug. 20, 1996; 61 FR 48733, Sept. 16, 1996; 61 FR 50691, Sept. 27, 1996; 62 FR 48747, Sept. 17, 1997; 63 FR 69993, 69994, Dec. 18, 1998; 65 FR 69657, Nov. 20, 2000; 67 FR 61762, Oct. 2, 2002; 70 FR 12112, Mar. 11, 2005; 73 FR 15388, Mar. 24, 2008; 76 FR 38548, July 1, 2011; 79 FR 28606, May 19, 2014]

### § 2635.205 Proper disposition of prohibited gifts.

(a) An employee who has received a gift that cannot be accepted under this subpart shall, unless the gift is accepted by an agency acting under specific statutory authority:

(1) Return any tangible item to the donor or pay the donor its market value. An employee who cannot ascertain the actual market value of an item may estimate its market value by reference to the retail cost of similar items of like quality. See § 2635.203(c).

*Example 1:* To avoid public embarrassment to the seminar sponsor, an employee of the National Park Service did not decline a barometer worth \$200 given at the conclusion of his speech on Federal lands policy. The employee must either return the barometer or promptly reimburse the sponsor \$200.

(2) When it is not practical to return a tangible item because it is perishable, the item may, at the discretion of the employee's supervisor or an agency ethics official, be given to an appropriate charity, shared within the recipient's office, or destroyed.

*Example 1:* With approval by the recipient's supervisor, a floral arrangement sent by a disability claimant to a helpful employee of the Social Security Administration may be placed in the office's reception area.

(3) For any entertainment, favor, service, benefit or other intangible, reimburse the donor the market value. Subsequent reciprocation by the employee does not constitute reimbursement.

*Example 1:* A Department of Defense employee wishes to attend a charitable event to which he has been offered a \$300 ticket by a prohibited source. Although his attendance is not in the interest of the agency under § 2635.204(g), he may attend if he reimburses the donor the \$300 face value of the ticket.

(4) Dispose of gifts from foreign governments or international organiza-

tions in accordance with 41 CFR part 101-49, and dispose of materials received in conjunction with official travel in accordance with 41 CFR 101-25.103.

(b) An agency may authorize disposition or return of gifts at Government expense. Employees may use penalty mail to forward reimbursements required or permitted by this section.

(c) An employee who, on his own initiative, promptly complies with the requirements of this section will not be deemed to have improperly accepted an unsolicited gift. An employee who promptly consults his agency ethics official to determine whether acceptance of an unsolicited gift is proper and who, upon the advice of the ethics official, returns the gift or otherwise disposes of the gift in accordance with this section, will be considered to have complied with the requirements of this section on his own initiative.

## Subpart C—Gifts Between Employees

### § 2635.301 Overview.

This subpart contains standards that prohibit an employee from giving, donating to, or soliciting contributions for, a gift to an official superior and from accepting a gift from an employee receiving less pay than himself, unless the item is excluded from the definition of a gift or falls within one of the exceptions set forth in this subpart.

### § 2635.302 General standards.

(a) *Gifts to superiors.* Except as provided in this subpart, an employee may not:

(1) Directly or indirectly, give a gift to or make a donation toward a gift for an official superior; or

(2) Solicit a contribution from another employee for a gift to either his own or the other employee's official superior.

(b) *Gifts from employees receiving less pay.* Except as provided in this subpart, an employee may not, directly or indirectly, accept a gift from an employee receiving less pay than himself unless:

(1) The two employees are not in a subordinate-official superior relationship; and

## § 2635.303

(2) There is a personal relationship between the two employees that would justify the gift.

(c) *Limitation on use of exceptions.* Notwithstanding any exception provided in this subpart, an official superior shall not coerce the offering of a gift from a subordinate.

### § 2635.303 Definitions.

For purposes of this subpart, the following definitions shall apply:

(a) *Gift* has the meaning set forth in § 2635.203(b). For purposes of that definition an employee will be deemed to have paid market value for any benefit received as a result of his participation in any carpool or other such mutual arrangement involving another employee or other employees if he bears his fair proportion of the expense or effort involved.

(b) *Indirectly*, for purposes of § 2635.302(b), has the meaning set forth in § 2635.203(f). For purposes of § 2635.302(a), it includes a gift:

(1) Given with the employee's knowledge and acquiescence by his parent, sibling, spouse, child, or dependent relative; or

(2) Given by a person other than the employee under circumstances where the employee has promised or agreed to reimburse that person or to give that person something of value in exchange for giving the gift.

(c) Subject to paragraph (a) of this section, market value has the meaning set forth in § 2635.203(c).

(d) *Official superior* means any other employee, other than the President and the Vice President, including but not limited to an immediate supervisor, whose official responsibilities include directing or evaluating the performance of the employee's official duties or those of any other official superior of the employee. For purposes of this subpart, an employee is considered to be the subordinate of any of his official superiors.

(e) *Solicit* means to request contributions by personal communication or by general announcement.

(f) *Voluntary contribution* means a contribution given freely, without pressure or coercion. A contribution is not voluntary unless it is made in an amount determined by the contrib-

## 5 CFR Ch. XVI (1–1–16 Edition)

uting employee, except that where an amount for a gift is included in the cost for a luncheon, reception or similar event, an employee who freely chooses to pay a proportionate share of the total cost in order to attend will be deemed to have made a voluntary contribution. Except in the case of contributions for a gift included in the cost of a luncheon, reception or similar event, a statement that an employee may choose to contribute less or not at all shall accompany any recommendation of an amount to be contributed for a gift to an official superior.

*Example 1:* A supervisory employee of the Agency for International Development has just been reassigned from Washington, DC to Kabul, Afghanistan. As a farewell party, 12 of her subordinates have decided to take her out to lunch at the Khyber Repast. It is understood that each will pay for his own meal and that the cost of the supervisor's lunch will be divided equally among the twelve. Even though the amount they will contribute is not determined until the supervisor orders lunch, the contribution made by those who choose to participate in the farewell lunch is voluntary.

### § 2635.304 Exceptions.

The prohibitions set forth in § 2635.302(a) and (b) do not apply to a gift given or accepted under the circumstances described in paragraph (a) or (b) of this section. A contribution or the solicitation of a contribution that would otherwise violate the prohibitions set forth in § 2635.302(a) and (b) may only be made in accordance with paragraph (c) of this section.

(a) *General exceptions.* On an occasional basis, including any occasion on which gifts are traditionally given or exchanged, the following may be given to an official superior or accepted from a subordinate or other employee receiving less pay:

(1) Items, other than cash, with an aggregate market value of \$10 or less per occasion;

(2) Items such as food and refreshments to be shared in the office among several employees;

(3) Personal hospitality provided at a residence which is of a type and value customarily provided by the employee to personal friends;

(4) Items given in connection with the receipt of personal hospitality if of

a type and value customarily given on such occasions; and

(5) Leave transferred under subpart I of part 630 of this title to an employee who is not an immediate supervisor, unless obtained in violation of § 630.912 of this title.

*Example 1:* Upon returning to work following a vacation at the beach, a claims examiner with the Department of Veterans Affairs may give his supervisor, and his supervisor may accept, a bag of saltwater taffy purchased on the boardwalk for \$8.

*Example 2:* An employee of the Federal Deposit Insurance Corporation whose bank examination responsibilities require frequent travel may not bring her supervisor, and her supervisor may not accept, souvenir coffee mugs from each of the cities she visits in the course of performing her duties, even though each of the mugs costs less than \$5. Gifts given on this basis are not occasional.

*Example 3:* The Secretary of Labor has invited the agency's General Counsel to a dinner party at his home. The General Counsel may bring a \$15 bottle of wine to the dinner party and the Secretary may accept this customary hostess gift from his subordinate, even though its cost is in excess of \$10.

*Example 4:* For Christmas, a secretary may give his supervisor, and the supervisor may accept, a poinsettia plant purchased for \$10 or less. The secretary may also invite his supervisor to a Christmas party in his home and the supervisor may attend.

(b) *Special, infrequent occasions.* A gift appropriate to the occasion may be given to an official superior or accepted from a subordinate or other employee receiving less pay:

(1) In recognition of infrequently occurring occasions of personal significance such as marriage, illness, or the birth or adoption of a child; or

(2) Upon occasions that terminate a subordinate-official superior relationship, such as retirement, resignation, or transfer.

*Example 1:* The administrative assistant to the personnel director of the Tennessee Valley Authority may send a \$30 floral arrangement to the personnel director who is in the hospital recovering from surgery. The personnel director may accept the gift.

*Example 2:* A chemist employed by the Food and Drug Administration has been invited to the wedding of the lab director who is his official superior. He may give the lab director and his bride, and they may accept, a place setting in the couple's selected china pattern purchased for \$70.

*Example 3:* Upon the occasion of the supervisor's retirement from Federal service, an

employee of the Fish and Wildlife Service may give her supervisor a book of wildlife photographs which she purchased for \$19. The retiring supervisor may accept the book.

(c) *Voluntary contributions.* An employee may solicit voluntary contributions of nominal amounts from fellow employees for an appropriate gift to an official superior and an employee may make a voluntary contribution of a nominal amount to an appropriate gift to an official superior:

(1) On a special, infrequent occasion as described in paragraph (b) of this section; or

(2) On an occasional basis, for items such as food and refreshments to be shared in the office among several employees.

An employee may accept such gifts to which a subordinate or other employee receiving less pay than himself has contributed.

*Example 1:* To mark the occasion of his retirement, members of the immediate staff of the Under Secretary of the Army would like to give him a party and provide him with a gift certificate. They may distribute an announcement of the party and include a nominal amount for a retirement gift in the fee for the party.

*Example 2:* The General Counsel of the National Endowment for the Arts may not collect contributions for a Christmas gift for the Chairman. Christmas occurs annually and is not an occasion of personal significance.

*Example 3:* Subordinates may not take up a collection for a gift to an official superior on the occasion of the superior's swearing in or promotion to a higher grade position within the supervisory chain of that organization. These are not events that mark the termination of the subordinate-official superior relationship, nor are they events of personal significance within the meaning of § 2635.304(b). However, subordinates may take up a collection and employees may contribute \$3 each to buy refreshments to be consumed by everyone in the immediate office to mark either such occasion.

*Example 4:* Subordinates may each contribute a nominal amount to a fund to give a gift to an official superior upon the occasion of that superior's transfer or promotion to a position outside the organization.

*Example 5:* An Assistant Secretary at the Department of the Interior is getting married. His secretary has decided that a microwave oven would be a nice gift from his staff

## § 2635.401

and has informed each of the Assistant Secretary's subordinates that they should contribute \$5 for the gift. Her method of collection is improper. Although she may recommend a \$5 contribution, the recommendation must be coupled with a statement that the employee whose contribution is solicited is free to contribute less or nothing at all.

### Subpart D—Conflicting Financial Interests

#### § 2635.401 Overview.

This subpart contains two provisions relating to financial interests. One is a disqualification requirement and the other is a prohibition on acquiring or continuing to hold specific financial interests. An employee may acquire or hold any financial interest not prohibited by § 2635.403. Notwithstanding that his acquisition or holding of a particular interest is proper, an employee is prohibited in accordance with § 2635.402 of this subpart from participating in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him has a financial interest, if the particular matter will have a direct and predictable effect on that interest. See also part 2640 of this chapter, for additional guidance amplifying § 2635.402.

[57 FR 35042, Aug. 7, 1992, as amended at 62 FR 48747, Sept. 17, 1997]

#### § 2635.402 Disqualifying financial interests.

(a) *Statutory prohibition.* An employee is prohibited by criminal statute, 18 U.S.C. 208(a), from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him under this statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest.

NOTE: Standards applicable when seeking non-Federal employment are contained in subpart F of this part and, if followed, will ensure that an employee does not violate 18 U.S.C. 208(a) or this section when he is negotiating for or has an arrangement concerning future employment. In all other cases where the employee's participation would violate 18 U.S.C. 208(a), an employee shall disqualify himself from participation in the matter in

## 5 CFR Ch. XVI (1–1–16 Edition)

accordance with paragraph (c) of this section or obtain a waiver or determine that an exemption applies, as described in paragraph (d) of this section.

(b) *Definitions.* For purposes of this section, the following definitions shall apply:

(1) *Direct and predictable effect.* (i) A particular matter will have a direct effect on a financial interest if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest. An effect may be direct even though it does not occur immediately. A particular matter will not have a direct effect on a financial interest, however, if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter. A particular matter that has an effect on a financial interest only as a consequence of its effects on the general economy does not have a direct effect within the meaning of this subpart.

(ii) A particular matter will have a predictable effect if there is a real, as opposed to a speculative possibility that the matter will affect the financial interest. It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial.

NOTE: If a particular matter involves a specific party or parties, generally the matter will at most only have a direct and predictable effect, for purposes of this subpart, on a financial interest of the employee in or with a party, such as the employee's interest by virtue of owning stock. There may, however, be some situations in which, under the above standards, a particular matter will have a direct and predictable effect on an employee's financial interests in or with a nonparty. For example, if a party is a corporation, a particular matter may also have a direct and predictable effect on an employee's financial interests through ownership of stock in an affiliate, parent, or subsidiary of that party. Similarly, the disposition of a protest against the award of a contract to a particular company may also have a direct and predictable effect on an employee's financial interest in another company listed as a subcontractor in the proposal of one of the competing offerors.

*Example 1:* An employee of the National Library of Medicine at the National Institutes of Health has just been asked to serve on the

technical evaluation panel to review proposals for a new library computer search system. DEF Computer Corporation, a closely held company in which he and his wife own a majority of the stock, has submitted a proposal. Because award of the systems contract to DEF or to any other offeror will have a direct and predictable effect on both his and his wife's financial interests, the employee cannot participate on the technical evaluation team unless his disqualification has been waived.

*Example 2:* Upon assignment to the technical evaluation panel, the employee in the preceding example finds that DEF Computer Corporation has not submitted a proposal. Rather, LMN Corp., with which DEF competes for private sector business, is one of the six offerors. The employee is not disqualified from serving on the technical evaluation panel. Any effect on the employee's financial interests as a result of the agency's decision to award or not award the systems contract to LMN would be at most indirect and speculative.

(2) *Imputed interests.* For purposes of 18 U.S.C. 208(a) and this subpart, the financial interests of the following persons will serve to disqualify an employee to the same extent as if they were the employee's own interests:

- (i) The employee's spouse;
- (ii) The employee's minor child;
- (iii) The employee's general partner;
- (iv) An organization or entity which the employee serves as officer, director, trustee, general partner or employee; and
- (v) A person with whom the employee is negotiating for or has an arrangement concerning prospective employment. (Employees who are seeking other employment should refer to and comply with the standards in subpart F of this part).

*Example 1:* An employee of the Department of Education serves without compensation on the board of directors of Kinder World, Inc., a nonprofit corporation that engages in good works. Even though her personal financial interests will not be affected, the employee must disqualify herself from participating in the review of a grant application submitted by Kinder World. Award or denial of the grant will affect the financial interests of Kinder World and its financial interests are imputed to her as a member of its board of directors.

*Example 2:* The spouse of an employee of the Food and Drug Administration has obtained a position with a well established biomedical research company. The company has developed an artificial limb for which it is

seeking FDA approval and the employee would ordinarily be asked to participate in the FDA's review and approval process. The spouse is a salaried employee of the company and has no direct ownership interest in the company. Nor does she have an indirect ownership interest, as would be the case, for example, if she were participating in a pension plan that held stock in the company. Her position with the company is such that the granting or withholding of FDA approval will not have a direct and predictable effect on her salary or on her continued employment with the company. Since the FDA approval process will not affect his spouse's financial interests, the employee is not disqualified under § 2635.402 from participating in that process. Nevertheless, the financial interests of the spouse's employer may be disqualifying under the impartiality principle, as implemented at § 2635.502.

(3) *Particular matter.* The term particular matter encompasses only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. Such a matter is covered by this subpart even if it does not involve formal parties and may include governmental action such as legislation or policy-making that is narrowly focused on the interests of such a discrete and identifiable class of persons. The term particular matter, however, does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons. The particular matters covered by this subpart include a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation or arrest.

*Example 1:* The Internal Revenue Service's amendment of its regulations to change the manner in which depreciation is calculated is not a particular matter, nor is the Social Security Administration's consideration of changes to its appeal procedures for disability claimants.

*Example 2:* Consideration by the Interstate Commerce Commission of regulations establishing safety standards for trucks on interstate highways involves a particular matter.

(4) *Personal and substantial.* To participate personally means to participate directly. It includes the direct and active supervision of the participation

of a subordinate in the matter. To participate substantially means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Personal and substantial participation may occur when, for example, an employee participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice in a particular matter.

(c) *Disqualification.* Unless the employee is authorized to participate in the particular matter by virtue of a waiver or exemption described in paragraph (d) of this section or because the interest has been divested in accordance with paragraph (e) of this section, an employee shall disqualify himself from participating in a particular matter in which, to his knowledge, he or a person whose interests are imputed to him has a financial interest, if the particular matter will have a direct and predictable effect on that interest. Disqualification is accomplished by not participating in the particular matter.

(1) *Notification.* An employee who becomes aware of the need to disqualify himself from participation in a particular matter to which he has been assigned should notify the person responsible for his assignment. An employee who is responsible for his own assignment should take whatever steps are necessary to ensure that he does not participate in the matter from which he is disqualified. Appropriate oral or written notification of the employee's disqualification may be made to co-workers by the employee or a supervisor to ensure that the employee is not involved in a matter from which he is disqualified.

(2) *Documentation.* An employee need not file a written disqualification

statement unless he is required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics or is asked by an agency ethics official or the person responsible for his assignment to file a written disqualification statement. However, an employee may elect to create a record of his actions by providing written notice to a supervisor or other appropriate official.

*Example 1:* An Assistant Secretary of the Department of the Interior owns recreational property that borders on land which is being considered for annexation to a national park. Annexation would directly and predictably increase the value of her vacation property and, thus, she is disqualified from participating in any way in the Department's deliberations or decisions regarding the annexation. Because she is responsible for determining which matters she will work on, she may accomplish her disqualification merely by ensuring that she does not participate in the matter. Because of the level of her position, however, the Assistant Secretary might be wise to establish a record that she has acted properly by providing a written disqualification statement to an official superior and by providing written notification of the disqualification to subordinates to ensure that they do not raise or discuss with her any issues related to the annexation.

(d) *Waiver of or exemptions from disqualification.* An employee who would otherwise be disqualified by 18 U.S.C. 208(a) may be permitted to participate in a particular matter where the otherwise disqualifying financial interest is the subject of a regulatory exemption or individual waiver described in this paragraph, or results from certain Indian birthrights as described in 18 U.S.C. 208(b)(4).

(1) *Regulatory exemptions.* Under 18 U.S.C. 208(b)(2), regulatory exemptions of general applicability have been issued by the Office of Government Ethics, based on its determination that particular interests are too remote or too inconsequential to affect the integrity of the services of employees to whom those exemptions apply. See the regulations in subpart B of part 2640 of this chapter, which supersede any pre-existing agency regulatory exemptions.

(2) *Individual waivers.* An individual waiver enabling the employee to participate in one or more particular matters may be issued under 18 U.S.C. 208(b)(1) if, in advance of the employee's participation:

(i) The employee:

(A) Advises the Government official responsible for the employee's appointment (or other Government official to whom authority to issue such a waiver for the employee has been delegated) about the nature and circumstances of the particular matter or matters; and

(B) Makes full disclosure to such official of the nature and extent of the disqualifying financial interest; and

(ii) Such official determines, in writing, that the employee's financial interest in the particular matter or matters is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such employee. See also subpart C of part 2640 of this chapter, for additional guidance.

(3) *Federal advisory committee member waivers.* An individual waiver may be issued under 18 U.S.C. 208(b)(3) to a special Government employee serving on, or under consideration for appointment to, an advisory committee within the meaning of the Federal Advisory Committee Act if the Government official responsible for the employee's appointment (or other Government official to whom authority to issue such a waiver for the employee has been delegated):

(i) Reviews the financial disclosure report filed by the special Government employee pursuant to the Ethics in Government Act of 1978; and

(ii) Certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the otherwise disqualifying financial interest. See also subpart C of part 2640 of this chapter, for additional guidance.

(4) *Consultation and notification regarding waivers.* When practicable, an official is required to consult formally or informally with the Office of Government Ethics prior to granting a waiver referred to in paragraph (d)(2) or (3) of this section. A copy of each such waiver is to be forwarded to the Director of the Office of Government Ethics.

(e) *Divestiture of a disqualifying financial interest.* Upon sale or other divestiture of the asset or other interest that causes his disqualification from participation in a particular matter, 18 U.S.C. 208(a) and paragraph (c) of this section will no longer prohibit the employee's participation in the matter.

(1) *Voluntary divestiture.* An employee who would otherwise be disqualified from participation in a particular matter may voluntarily sell or otherwise divest himself of the interest that causes the disqualification.

(2) *Directed divestiture.* An employee may be required to sell or otherwise divest himself of the disqualifying financial interest if his continued holding of that interest is prohibited by statute or by agency supplemental regulation issued in accordance with § 2635.403(a), or if the agency determines in accordance with § 2635.403(b) that a substantial conflict exists between the financial interest and the employee's duties or accomplishment of the agency's mission.

(3) *Eligibility for special tax treatment.* An employee who is directed to divest an interest may be eligible to defer the tax consequences of divestiture under subpart J of part 2634 of this chapter. An employee who divests before obtaining a certificate of divestiture will not be eligible for this special tax treatment.

(f) *Official duties that give rise to potential conflicts.* Where an employee's official duties create a substantial likelihood that the employee may be assigned to a particular matter from which he is disqualified, the employee should advise his supervisor or other person responsible for his assignments of that potential so that conflicting assignments can be avoided, consistent with the agency's needs.

[57 FR 35042, Aug. 7, 1992, as amended at 62 FR 48747, Sept. 17, 1997]

#### § 2635.403 Prohibited financial interests.

An employee shall not acquire or hold any financial interest that he is prohibited from acquiring or holding by statute, by agency regulation issued in accordance with paragraph (a) of this section or by reason of an agency

## § 2635.403

## 5 CFR Ch. XVI (1–1–16 Edition)

determination of substantial conflict under paragraph (b) of this section.

NOTE: There is no statute of Government-wide applicability prohibiting employees from holding or acquiring any financial interest. Statutory restrictions, if any, are contained in agency statutes which, in some cases, may be implemented by agency regulations issued independent of this part.

(a) *Agency regulation prohibiting certain financial interests.* An agency may, by supplemental agency regulation issued after February 3, 1993, prohibit or restrict the acquisition or holding of a financial interest or a class of financial interests by agency employees, or any category of agency employees, and the spouses and minor children of those employees, based on the agency's determination that the acquisition or holding of such financial interests would cause a reasonable person to question the impartiality and objectivity with which agency programs are administered. Where the agency restricts or prohibits the holding of certain financial interests by its employees' spouses or minor children, any such prohibition or restriction shall be based on a determination that there is a direct and appropriate nexus between the prohibition or restriction as applied to spouses and minor children and the efficiency of the service.

(b) *Agency determination of substantial conflict.* An agency may prohibit or restrict an individual employee from acquiring or holding a financial interest or a class of financial interests based upon the agency designee's determination that the holding of such interest or interests will:

(1) Require the employee's disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired; or

(2) Adversely affect the efficient accomplishment of the agency's mission because another employee cannot be readily assigned to perform work from which the employee would be disqualified by reason of the financial interest.

*Example 1:* An Air Force employee who owns stock in a major aircraft engine manufacturer is being considered for promotion to a position that involves responsibility for development of a new fighter airplane. If the

agency determined that engineering and other decisions about the Air Force's requirements for the fighter would directly and predictably affect his financial interests, the employee could not, by virtue of 18 U.S.C. 208(a), perform these significant duties of the position while retaining his stock in the company. The agency can require the employee to sell his stock as a condition of being selected for the position rather than allowing him to disqualify himself in particular matters.

(c) *Definition of financial interest.* For purposes of this section:

(1) Except as provided in paragraph (c)(2) of this section, the term financial interest is limited to financial interests that are owned by the employee or by the employee's spouse or minor children. However, the term is not limited to only those financial interests that would be disqualifying under 18 U.S.C. 208(a) and § 2635.402. The term includes any current or contingent ownership, equity, or security interest in real or personal property or a business and may include an indebtedness or compensated employment relationship. It thus includes, for example, interests in the nature of stocks, bonds, partnership interests, fee and leasehold interests, mineral and other property rights, deeds of trust, and liens, and extends to any right to purchase or acquire any such interest, such as a stock option or commodity future. It does not include a future interest created by someone other than the employee, his spouse, or dependent child or any right as a beneficiary of an estate that has not been settled.

*Example 1:* A regulatory agency has concluded that ownership by its employees of stock in entities regulated by the agency would significantly diminish public confidence in the agency's performance of its regulatory functions and thereby interfere with the accomplishment of its mission. In its supplemental agency regulations, the agency may prohibit its employees from acquiring or continuing to hold stock in regulated entities.

*Example 2:* An agency that insures bank deposits may, by supplemental agency regulation, prohibit its employees who are bank examiners from obtaining loans from banks they examine. Examination of a member bank could have no effect on an employee's fixed obligation to repay a loan from that bank and, thus, would not affect an employee's financial interests so as to require disqualification under § 2635.402. Nevertheless, a



## Office of Government Ethics

## § 2635.501

loan from a member bank is a discrete financial interest within the meaning of § 2635.403(c) that may, when appropriate, be prohibited by supplemental agency regulation.

(2) The term financial interest includes service, with or without compensation, as an officer, director, trustee, general partner or employee of any person, including a nonprofit entity, whose financial interests are imputed to the employee under § 2635.402(b)(2)(iii) or (iv).

*Example 1.* The Foundation for the Preservation of Wild Horses maintains herds of horses that graze on public and private lands. Because its costs are affected by Federal policies regarding grazing permits, the Foundation routinely comments on all proposed rules governing use of Federal grasslands issued by the Bureau of Land Management. BLM may require an employee to resign his uncompensated position as Vice President of the Foundation as a condition of his promotion to a policy-level position within the Bureau rather than allowing him to rely on disqualification in particular cases.

(d) *Reasonable period to divest or terminate.* Whenever an agency directs divestiture of a financial interest under paragraph (a) or (b) of this section, the employee shall be given a reasonable period of time, considering the nature of his particular duties and the nature and marketability of the interest, within which to comply with the agency's direction. Except in cases of unusual hardship, as determined by the agency, a reasonable period shall not exceed 90 days from the date divestiture is first directed. However, as long as the employee continues to hold the financial interest, he remains subject to any restrictions imposed by this subpart.

(e) *Eligibility for special tax treatment.* An employee required to sell or otherwise divest a financial interest may be eligible to defer the tax consequences of divestiture under subpart J of part 2634 of this chapter.

[57 FR 35042, Aug. 7, 1992, as amended at 59 FR 4780, Feb. 2, 1994; 60 FR 6391, Feb. 2, 1995; 60 FR 66858, Dec. 27, 1995; 61 FR 40951, Aug. 7, 1996; 62 FR 48748, Sept. 17, 1996]

## Subpart E—Impartiality in Performing Official Duties

### § 2635.501 Overview.

(a) This subpart contains two provisions intended to ensure that an employee takes appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Under § 2635.502, unless he receives prior authorization, an employee should not participate in a particular matter involving specific parties which he knows is likely to affect the financial interests of a member of his household, or in which he knows a person with whom he has a covered relationship is or represents a party, if he determines that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter. An employee who is concerned that other circumstances would raise a question regarding his impartiality should use the process described in § 2635.502 to determine whether he should or should not participate in a particular matter.

(b) Under § 2635.503, an employee who has received an extraordinary severance or other payment from a former employer prior to entering Government service is subject, in the absence of a waiver, to a two-year period of disqualification from participation in particular matters in which that former employer is or represents a party.

NOTE: Questions regarding impartiality necessarily arise when an employee's official duties impact upon the employee's own financial interests or those of certain other persons, such as the employee's spouse or minor child. An employee is prohibited by criminal statute, 18 U.S.C. 208(a), from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he, his spouse, general partner or minor child has a financial interest, if the particular matter will have a direct and predictable effect on that interest. The statutory prohibition also extends to an employee's participation in a particular matter in which, to his knowledge, an organization in which the employee is serving as officer, director, trustee, general partner or employee, or with whom he is negotiating or has an arrangement concerning prospective employment has a financial interest. Where the employee's participation in a particular

## § 2635.502

matter would affect any one of these financial interests, the standards set forth in subparts D or F of this part apply and only a statutory waiver or exemption, as described in §§ 2635.402(d) and 2635.605(a), will enable the employee to participate in that matter. The authorization procedures in § 2635.502(d) may not be used to authorize an employee's participation in any such matter. Where the employee complies with all terms of the waiver, the granting of a statutory waiver will be deemed to constitute a determination that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of agency programs and operations. Similarly, where the employee meets all prerequisites for the application of one of the exemptions set forth in subpart B of part 2640 of this chapter, that also constitutes a determination that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of agency programs and operations.

[57 FR 35042, Aug. 7, 1992, as amended at 62 FR 48748, Sept. 17, 1997]

### § 2635.502 Personal and business relationships.

(a) *Consideration of appearances by the employee.* Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.

(1) In considering whether a relationship would cause a reasonable person to question his impartiality, an employee may seek the assistance of his supervisor, an agency ethics official or the agency designee.

(2) An employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine

## 5 CFR Ch. XVI (1–1–16 Edition)

whether he should or should not participate in a particular matter.

(b) *Definitions.* For purposes of this section:

(1) An employee has a *covered relationship* with:

(i) A person, other than a prospective employer described in § 2635.603(c), with whom the employee has or seeks a business, contractual or other financial relationship that involves other than a routine consumer transaction;

NOTE: An employee who is seeking employment within the meaning of § 2635.603 shall comply with subpart F of this part rather than with this section.

(ii) A person who is a member of the employee's household, or who is a relative with whom the employee has a close personal relationship;

(iii) A person for whom the employee's spouse, parent or dependent child is, to the employee's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee;

(iv) Any person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; or

(v) An organization, other than a political party described in 26 U.S.C. 527(e), in which the employee is an active participant. Participation is active if, for example, it involves service as an official of the organization or in a capacity similar to that of a committee or subcommittee chairperson or spokesperson, or participation in directing the activities of the organization. In other cases, significant time devoted to promoting specific programs of the organization, including coordination of fundraising efforts, is an indication of active participation. Payment of dues or the donation or solicitation of financial support does not, in itself, constitute active participation.

NOTE: Nothing in this section shall be construed to suggest that an employee should not participate in a matter because of his political, religious or moral views.

(2) *Direct and predictable effect* has the meaning set forth in § 2635.402(b)(1).

(3) *Particular matter involving specific parties* has the meaning set forth in § 2637.102(a)(7) of this chapter.

*Example 1:* An employee of the General Services Administration has made an offer to purchase a restaurant owned by a local developer. The developer has submitted an offer in response to a GSA solicitation for lease of office space. Under the circumstances, she would be correct in concluding that a reasonable person would be likely to question her impartiality if she were to participate in evaluating that developer's or its competitor's lease proposal.

*Example 2:* An employee of the Department of Labor is providing technical assistance in drafting occupational safety and health legislation that will affect all employers of five or more persons. His wife is employed as an administrative assistant by a large corporation that will incur additional costs if the proposed legislation is enacted. Because the legislation is not a particular matter involving specific parties, the employee may continue to work on the legislation and need not be concerned that his wife's employment with an affected corporation would raise a question concerning his impartiality.

*Example 3:* An employee of the Defense Logistics Agency who has responsibilities for testing avionics being produced by an Air Force contractor has just learned that his sister-in-law has accepted employment as an engineer with the contractor's parent corporation. Where the parent corporation is a conglomerate, the employee could reasonably conclude that, under the circumstances, a reasonable person would not be likely to question his impartiality if he were to continue to perform his test and evaluation responsibilities.

*Example 4:* An engineer has just resigned from her position as vice president of an electronics company in order to accept employment with the Federal Aviation Administration in a position involving procurement responsibilities. Although the employee did not receive an extraordinary payment in connection with her resignation and has severed all financial ties with the firm, under the circumstances she would be correct in concluding that her former service as an officer of the company would be likely to cause a reasonable person to question her impartiality if she were to participate in the administration of a DOT contract for which the firm is a first-tier subcontractor.

*Example 5:* An employee of the Internal Revenue Service is a member of a private organization whose purpose is to restore a Victorian-era railroad station and she chairs its annual fundraising drive. Under the circumstances, the employee would be correct in concluding that her active membership in the organization would be likely to cause a reasonable person to question her impar-

tiality if she were to participate in an IRS determination regarding the tax-exempt status of the organization.

(c) *Determination by agency designee.* Where he has information concerning a potential appearance problem arising from the financial interest of a member of the employee's household in a particular matter involving specific parties, or from the role in such matter of a person with whom the employee has a covered relationship, the agency designee may make an independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question the employee's impartiality in the matter. Ordinarily, the agency designee's determination will be initiated by information provided by the employee pursuant to paragraph (a) of this section. However, at any time, including after the employee has disqualified himself from participation in a matter pursuant to paragraph (e) of this section, the agency designee may make this determination on his own initiative or when requested by the employee's supervisor or any other person responsible for the employee's assignment.

(1) If the agency designee determines that the employee's impartiality is likely to be questioned, he shall then determine, in accordance with paragraph (d) of this section, whether the employee should be authorized to participate in the matter. Where the agency designee determines that the employee's participation should not be authorized, the employee will be disqualified from participation in the matter in accordance with paragraph (e) of this section.

(2) If the agency designee determines that the employee's impartiality is not likely to be questioned, he may advise the employee, including an employee who has reached a contrary conclusion under paragraph (a) of this section, that the employee's participation in the matter would be proper.

(d) *Authorization by agency designee.* Where an employee's participation in a particular matter involving specific parties would not violate 18 U.S.C. 208(a), but would raise a question in the mind of a reasonable person about his impartiality, the agency designee may authorize the employee to participate

in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Factors which may be taken into consideration include:

- (1) The nature of the relationship involved;
- (2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;
- (3) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) The sensitivity of the matter;
- (5) The difficulty of reassigning the matter to another employee; and
- (6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

Authorization by the agency designee shall be documented in writing at the agency designee's discretion or when requested by the employee. An employee who has been authorized to participate in a particular matter involving specific parties may not thereafter disqualify himself from participation in the matter on the basis of an appearance problem involving the same circumstances that have been considered by the agency designee.

*Example 1:* The Deputy Director of Personnel for the Department of the Treasury and an attorney with the Department's Office of General Counsel are general partners in a real estate partnership. The Deputy Director advises his supervisor, the Director of Personnel, of the relationship upon being assigned to a selection panel for a position for which his partner has applied. If selected, the partner would receive a substantial increase in salary. The agency designee cannot authorize the Deputy Director to participate on the panel under the authority of this section since the Deputy Director is prohibited by criminal statute, 18 U.S.C. 208(a), from participating in a particular matter affecting the financial interest of a person who is his general partner. See § 2635.402.

*Example 2:* A new employee of the Securities and Exchange Commission is assigned to an investigation of insider trading by the

brokerage house where she had recently been employed. Because of the sensitivity of the investigation, the agency designee may be unable to conclude that the Government's interest in the employee's participation in the investigation outweighs the concern that a reasonable person may question the integrity of the investigation, even though the employee has severed all financial ties with the company. Based on consideration of all relevant circumstances, the agency designee might determine, however, that it is in the interest of the Government for the employee to pass on a routine filing by the particular brokerage house.

*Example 3:* An Internal Revenue Service employee involved in a long and complex tax audit is advised by her son that he has just accepted an entry-level management position with a corporation whose taxes are the subject of the audit. Because the audit is essentially complete and because the employee is the only one with an intimate knowledge of the case, the agency designee might determine, after considering all relevant circumstances, that it is in the Government's interest for the employee to complete the audit, which is subject to additional levels of review.

(e) *Disqualification.* Unless the employee is authorized to participate in the matter under paragraph (d) of this section, an employee shall not participate in a particular matter involving specific parties when he or the agency designee has concluded, in accordance with paragraph (a) or (c) of this section, that the financial interest of a member of the employee's household, or the role of a person with whom he has a covered relationship, is likely to raise a question in the mind of a reasonable person about his impartiality. Disqualification is accomplished by not participating in the matter.

(1) *Notification.* An employee who becomes aware of the need to disqualify himself from participation in a particular matter involving specific parties to which he has been assigned should notify the person responsible for his assignment. An employee who is responsible for his own assignment should take whatever steps are necessary to ensure that he does not participate in the matter from which he is disqualified. Appropriate oral or written notification of the employee's disqualification may be made to coworkers by the employee or a supervisor to ensure that the employee is not involved in a particular matter involving

specific parties from which he is disqualified.

(2) *Documentation.* An employee need not file a written disqualification statement unless he is required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics or is specifically asked by an agency ethics official or the person responsible for his assignment to file a written disqualification statement. However, an employee may elect to create a record of his actions by providing written notice to a supervisor or other appropriate official.

(f) *Relevant considerations.* An employee's reputation for honesty and integrity is not a relevant consideration for purposes of any determination required by this section.

#### § 2635.503 Extraordinary payments from former employers.

(a) *Disqualification requirement.* Except as provided in paragraph (c) of this section, an employee shall be disqualified for two years from participating in any particular matter in which a former employer is a party or represents a party if he received an extraordinary payment from that person prior to entering Government service. The two-year period of disqualification begins to run on the date that the extraordinary payment is received.

*Example 1:* Following his confirmation hearings and one month before his scheduled swearing in, a nominee to the position of Assistant Secretary of a department received an extraordinary payment from his employer. For one year and 11 months after his swearing in, the Assistant Secretary may not participate in any particular matter to which his former employer is a party.

*Example 2:* An employee received an extraordinary payment from her former employer, a coal mine operator, prior to entering on duty with the Department of the Interior. For two years thereafter, she may not participate in a determination regarding her former employer's obligation to reclaim a particular mining site, because her former employer is a party to the matter. However, she may help to draft reclamation legislation affecting all coal mining operations because this legislation does not involve any parties.

(b) *Definitions.* For purposes of this section, the following definitions shall apply:

(1) *Extraordinary payment* means any item, including cash or an investment interest, with a value in excess of \$10,000, which is paid:

(i) On the basis of a determination made after it became known to the former employer that the individual was being considered for or had accepted a Government position; and

(ii) Other than pursuant to the former employer's established compensation, partnership, or benefits program. A compensation, partnership, or benefits program will be deemed an established program if it is contained in bylaws, a contract or other written form, or if there is a history of similar payments made to others not entering into Federal service.

*Example 1:* The vice president of a small corporation is nominated to be an ambassador. In recognition of his service to the corporation, the board of directors votes to pay him \$50,000 upon his confirmation in addition to the regular severance payment provided for by the corporate bylaws. The regular severance payment is not an extraordinary payment. The gratuitous payment of \$50,000 is an extraordinary payment, since the corporation had not made similar payments to other departing officers.

(2) *Former employer* includes any person which the employee served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee.

(c) *Waiver of disqualification.* The disqualification requirement of this section may be waived based on a finding that the amount of the payment was not so substantial as to cause a reasonable person to question the employee's ability to act impartially in a matter in which the former employer is or represents a party. The waiver shall be in writing and may be given only by the head of the agency or, where the recipient of the payment is the head of the agency, by the President or his designee. Waiver authority may be delegated by agency heads to any person who has been delegated authority to issue individual waivers under 18 U.S.C. 208(b) for the employee who is the recipient of the extraordinary payment.

## Subpart F—Seeking Other Employment

### § 2635.601 Overview.

This subpart contains a disqualification requirement that applies to employees when seeking employment with persons whose financial interests would be directly and predictably affected by particular matters in which the employees participate personally and substantially. Specifically, it addresses the requirement of 18 U.S.C. 208(a) that an employee disqualify himself from participation in any particular matter that will have a direct and predictable effect on the financial interests of a person “with whom he is negotiating or has any arrangement concerning prospective employment.” See § 2635.402 and § 2640.103 of this chapter. Beyond this statutory requirement, it also addresses the issues of lack of impartiality that require disqualification from particular matters affecting the financial interests of a prospective employer when an employee’s actions in seeking employment fall short of actual employment negotiations.

[57 FR 35042, Aug. 7, 1992, as amended at 64 FR 13064, Mar. 17, 1999]

### § 2635.602 Applicability and related considerations.

To ensure that he does not violate 18 U.S.C. 208(a) or the principles of ethical conduct contained in § 2635.101(b), an employee who is seeking employment or who has an arrangement concerning prospective employment shall comply with the applicable disqualification requirements of §§ 2635.604 and 2635.606 if particular matters in which the employee will be participating personally and substantially would directly and predictably affect the financial interests of a prospective employer or of a person with whom he has an arrangement concerning prospective employment. Compliance with this subpart also will ensure that the employee does not violate subpart D or E of this part.

NOTE: An employee who is seeking employment with a person whose financial interests are not affected directly and predictably by particular matters in which he participates personally and substantially has no obligation under this subpart. An employee may, however, be subject to other statutes which

impose requirements on employment contacts or discussions, such as 41 U.S.C. 423(c), applicable to agency officials involved in certain procurement matters.

(a) *Related employment restrictions*—(1) *Outside employment while a Federal employee.* An employee who is contemplating outside employment to be undertaken concurrently with his Federal employment must abide by any limitations applicable to his outside activities under subparts G and H of this part. He must also comply with any disqualification requirement that may be applicable under subpart D or E of this part as a result of his outside employment activities.

(2) *Post-employment restrictions.* An employee who is contemplating employment to be undertaken following the termination of his Federal employment should consult an agency ethics official to obtain advice regarding any post-employment restrictions that may be applicable. Regulations implementing the Governmentwide post-employment statute, 18 U.S.C. 207, are contained in parts 2637 and 2641 of this chapter. Employees are cautioned that they may be subject to additional statutory prohibitions on post-employment acceptance of compensation from contractors, such as 41 U.S.C. 423(d).

(b) *Interview trips and entertainment.* Where a prospective employer who is a prohibited source as defined in § 2635.203(d) offers to reimburse an employee’s travel expenses, or provide other reasonable amenities incident to employment discussions, the employee may accept such amenities in accordance with § 2635.204(e)(3).

[57 FR 35042, Aug. 7, 1992, as amended at 62 FR 48748, Sept. 17, 1997; 64 FR 13064, Mar. 17, 1999]

### § 2635.603 Definitions.

For purposes of this subpart:

(a) *Employment* means any form of non-Federal employment or business relationship involving the provision of personal services by the employee, whether to be undertaken at the same time as or subsequent to Federal employment. It includes but is not limited to personal services as an officer, director, employee, agent, attorney, consultant, contractor, general partner or trustee.

## Office of Government Ethics

§ 2635.603

*Example 1:* An employee of the Bureau of Indian Affairs who has announced her intention to retire is approached by tribal representatives concerning a possible consulting contract with the tribe. The independent contractual relationship the tribe wishes to negotiate is employment for purposes of this subpart.

*Example 2:* An employee of the Department of Health and Human Services is invited to a meeting with officials of a nonprofit corporation to discuss the possibility of his serving as a member of the corporation's board of directors. Service, with or without compensation, as a member of the board of directors constitutes employment for purposes of this subpart.

(b) An employee is seeking employment once he has begun seeking employment within the meaning of paragraph (b)(1) of this section and until he is no longer seeking employment within the meaning of paragraph (b)(2) of this section.

(1) An employee has begun seeking employment if he has directly or indirectly:

(i) Engaged in negotiations for employment with any person. For these purposes, as for 18 U.S.C. 208(a), the term negotiations means discussion or communication with another person, or such person's agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person. The term is not limited to discussions of specific terms and conditions of employment in a specific position;

(ii) Made an unsolicited communication to any person, or such person's agent or intermediary, regarding possible employment with that person. However, the employee has not begun seeking employment if that communication was:

(A) For the sole purpose of requesting a job application; or

(B) For the purpose of submitting a resume or other employment proposal to a person affected by the performance or nonperformance of the employee's duties only as part of an industry or other discrete class. The employee will be considered to have begun seeking employment upon receipt of any response indicating an interest in employment discussions; or

(iii) Made a response other than rejection to an unsolicited communication from any person, or such person's

agent or intermediary, regarding possible employment with that person.

(2) An employee is no longer seeking employment when:

(i) The employee or the prospective employer rejects the possibility of employment and all discussions of possible employment have terminated; or

(ii) Two months have transpired after the employee's dispatch of an unsolicited resume or employment proposal, provided the employee has received no indication of interest in employment discussions from the prospective employer.

(3) For purposes of this definition, a response that defers discussions until the foreseeable future does not constitute rejection of an unsolicited employment overture, proposal, or resume nor rejection of a prospective employment possibility.

*Example 1:* An employee of the Health Care Financing Administration is complimented on her work by an official of a State Health Department who asks her to call if she is ever interested in leaving Federal service. The employee explains to the State official that she is very happy with her job at HCFA and is not interested in another job. She thanks him for his compliment regarding her work and adds that she'll remember his interest if she ever decides to leave the Government. The employee has rejected the unsolicited employment overture and has not begun seeking employment.

*Example 2:* The employee in the preceding example responds by stating that she cannot discuss future employment while she is working on a project affecting the State's health care funding but would like to discuss employment with the State when the project is completed. Because the employee has merely deferred employment discussions until the foreseeable future, she has begun seeking employment with the State Health Department.

*Example 3:* An employee of the Defense Contract Audit Agency is auditing the overhead accounts of an Army contractor. While at the contractor's headquarters, the head of the contractor's accounting division tells the employee that his division is thinking about hiring another accountant and asks whether the employee might be interested in leaving DCAA. The DCAA employee says he is interested in knowing what kind of work would be involved. They discuss the duties of the position the accounting division would like to fill and the DCAA employee's qualifications for the position. They do not discuss salary. The head of the division explains that he has

not yet received authorization to fill the particular position and will get back to the employee when he obtains the necessary approval for additional staffing. The employee and the contractor's official have engaged in negotiations regarding possible employment. The employee has begun seeking employment with the Army contractor.

*Example 4:* An employee of the Occupational Safety and Health Administration helping to draft safety standards applicable to the textile industry has mailed his resume to 25 textile manufacturers. He has not begun seeking employment with any of the twenty-five. If he receives a response from one of the resume recipients indicating an interest in employment discussions, the employee will have begun seeking employment with the respondent at that time.

*Example 5:* A special Government employee of the Federal Deposit Insurance Corporation is serving on an advisory committee formed for the purpose of reviewing rules applicable to all member banks. She mails an unsolicited letter to a member bank offering her services as a contract consultant. She has not begun seeking employment with the bank until she receives some response indicating an interest in discussing her employment proposal. A letter merely acknowledging receipt of the proposal is not an indication of interest in employment discussions.

*Example 6:* A geologist employed by the U.S. Geological Survey has been working as a member of a team preparing the Government's case in an action brought by the Government against six oil companies. The geologist sends her resume to an oil company that is a named defendant in the action. The geologist has begun seeking employment with that oil company and will be seeking employment for two months from the date the resume was mailed. However, if she withdraws her application or is notified within the two-month period that her resume has been rejected, she will no longer be seeking employment with the oil company as of the date she makes such withdrawal or receives such notification.

(c) *Prospective employer* means any person with whom the employee is seeking employment. Where contacts that constitute seeking employment are made by or with an agent or other intermediary, the term prospective employer includes:

(1) A person who uses that agent or other intermediary for the purpose of seeking to establish an employment relationship with the employee if the agent identifies the prospective employer to the employee; and

(2) A person contacted by the employee's agent or other intermediary for the purpose of seeking to establish an employment relationship if the agent identifies the prospective employer to the employee.

*Example 1:* An employee of the Federal Aviation Administration has overall responsibility for airport safety inspections in a three-state area. She has retained an employment search firm to help her find another job. The search firm has just reported to the FAA employee that it has given her resume to and had promising discussions with two airport authorities within her jurisdiction. Even though the employee has not personally had employment discussions with either, each airport authority is her prospective employer. She began seeking employment with each upon learning its identity and that it has been given her resume.

(d) *Direct and predictable effect, particular matter, and personal and substantial* have the respective meanings set forth in § 2635.402(b)(1), (3), and (4).

[57 FR 35042, Aug. 7, 1992, as amended at 64 FR 13064, Mar. 17, 1999]

**§ 2635.604 Disqualification while seeking employment.**

(a) *Obligation to disqualify.* Unless the employee's participation is authorized in accordance with § 2635.605, the employee shall not participate personally and substantially in a particular matter that, to his knowledge, has a direct and predictable effect on the financial interests of a prospective employer with whom he is seeking employment within the meaning of § 2635.603(b). Disqualification is accomplished by not participating in the particular matter.

(b) *Notification.* An employee who becomes aware of the need to disqualify himself from participation in a particular matter to which he has been assigned should notify the person responsible for his assignment. An employee who is responsible for his own assignment should take whatever steps are necessary to ensure that he does not participate in the matter from which he is disqualified. Appropriate oral or written notification of the employee's disqualification may be made to coworkers by the employee or a supervisor to ensure that the employee is not involved in a matter from which he is disqualified.



(c) *Documentation.* An employee need not file a written disqualification statement unless he is required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics or is specifically asked by an agency ethics official or the person responsible for his assignment to file a written disqualification statement. However, an employee may elect to create a record of his actions by providing written notice to a supervisor or other appropriate official.

*Example 1:* An employee of the Department of Veterans Affairs is participating in the audit of a contract for laboratory support services. Before sending his resume to a lab which is a subcontractor under the VA contract, the employee should disqualify himself from participation in the audit. Since he cannot withdraw from participation in the contract audit without the approval of his supervisor, he should disclose his intentions to his supervisor in order that appropriate adjustments in his work assignments can be made.

*Example 2:* An employee of the Food and Drug Administration is contacted in writing by a pharmaceutical company concerning possible employment with the company. The employee is involved in testing a drug for which the company is seeking FDA approval. Before making a response that is not a rejection, the employee should disqualify himself from further participation in the testing. Where he has authority to ask his colleague to assume his testing responsibilities, he may accomplish his disqualification by transferring the work to that coworker. However, to ensure that his colleague and others with whom he had been working on the recommendations do not seek his advice regarding testing or otherwise involve him in the matter, it may be necessary for him to advise those individuals of his disqualification.

*Example 3:* The General Counsel of a regulatory agency wishes to engage in discussions regarding possible employment as corporate counsel of a regulated entity. Matters directly affecting the financial interests of the regulated entity are pending within the Office of General Counsel, but the General Counsel will not be called upon to act in any such matter because signature authority for that particular class of matters has been delegated to an Assistant General Counsel. Because the General Counsel is responsible for assigning work within the Office of General Counsel, he can in fact accomplish his disqualification by simply avoiding any involvement in matters affecting the regulated entity. However, because it is likely to be as-

sumed by others that the General Counsel is involved in all matters within the cognizance of the Office of General Counsel, he would be wise to file a written disqualification statement with the Commissioners of the regulatory agency and provide his subordinates with written notification of his disqualification, or he may be specifically asked by an agency ethics official or the Commissioners to file a written disqualification statement.

*Example 4:* A scientist is employed by the National Science Foundation as a special Government employee to serve on a panel that reviews grant applications to fund research relating to deterioration of the ozone layer. She is discussing possible employment as a member of the faculty of a university that several years earlier received an NSF grant to study the effect of fluorocarbons, but has no grant application pending. As long as the university does not submit a new application for the panel's review, the employee would not have to take any action to effect disqualification.

(d) *Agency determination of substantial conflict.* Where the agency determines that the employee's action in seeking employment with a particular person will require his disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired, the agency may allow the employee to take annual leave or leave without pay while seeking employment, or may take other appropriate administrative action.

[57 FR 35042, Aug. 7, 1992, as amended at 64 FR 13064, Mar. 17, 1999]

**§ 2635.605 Waiver or authorization permitting participation while seeking employment.**

(a) *Waiver.* Where, as defined in § 2635.603(b)(1)(i), an employee is engaged in discussions that constitute employment negotiations for purposes of 18 U.S.C. 208(a), the employee may participate personally and substantially in a particular matter that has a direct and predictable effect on the financial interests of a prospective employer only after receiving a written waiver issued under the authority of 18 U.S.C. 208(b)(1) or (b)(3). These waivers are described in § 2635.402(d). See also subpart C of part 2640 of this chapter. For certain employees, a regulatory exemption under the authority of 18

## § 2635.606

## 5 CFR Ch. XVI (1–1–16 Edition)

U.S.C. 208(b)(2) may also apply (see subpart B of part 2640 of this chapter).

*Example 1:* An employee of the Department of Agriculture has had two telephone conversations with an orange grower regarding possible employment. They have discussed the employee's qualifications for a particular position with the grower, but have not yet discussed salary or other specific terms of employment. The employee is negotiating for employment within the meaning of 18 U.S.C. 208(a) and § 2635.603(b)(1)(i). In the absence of a written waiver issued under 18 U.S.C. 208(b)(1), she may not take official action on a complaint filed by a competitor alleging that the grower has shipped oranges in violation of applicable quotas.

(b) *Authorization by agency designee.* Where an employee is seeking employment within the meaning of § 2635.603(b)(1) (ii) or (iii), a reasonable person would be likely to question his impartiality if he were to participate personally and substantially in a particular matter that has a direct and predictable effect on the financial interests of any such prospective employer. The employee may participate in such matters only where the agency designee has authorized his participation in accordance with the standards set forth in § 2635.502(d).

*Example 1:* Within the past month, an employee of the Education Department mailed her resume to a university. She is thus seeking employment with the university within the meaning of § 2635.603(b)(1)(ii) even though she has received no reply. In the absence of specific authorization by the agency designee in accordance with § 2635.502(d), she may not participate in an assignment to review a grant application submitted by the university.

[57 FR 35042, Aug. 7, 1992, as amended at 62 FR 48748, Sept. 17, 1997; 64 FR 13064, Mar. 17, 1999]

### § 2635.606 Disqualification based on an arrangement concerning prospective employment or otherwise after negotiations.

(a) *Employment or arrangement concerning employment.* An employee shall be disqualified from participating personally and substantially in a particular matter that has a direct and predictable effect on the financial interests of the person by whom he is employed or with whom he has an arrangement concerning future employment, unless authorized to participate

in the matter by a written waiver issued under the authority of 18 U.S.C. 208 (b)(1) or (b)(3), or by a regulatory exemption under the authority of 18 U.S.C. 208 (b)(2). These waivers and exemptions are described in § 2635.402(d). See also subparts B and C of part 2640 of this chapter.

*Example 1:* A military officer has accepted a job with a defense contractor to begin in six months, after his retirement from military service. During the period that he remains with the Government, the officer may not participate in the administration of a contract with that particular defense contractor unless he has received a written waiver under the authority of 18 U.S.C. 208(b)(1).

*Example 2:* An accountant has just been offered a job with the Comptroller of the Currency which involves a two-year limited appointment. Her private employer, a large corporation, believes the job will enhance her skills and has agreed to give her a two-year unpaid leave of absence at the end of which she has agreed to return to work for the corporation. During the two-year period she is to be a COC employee, the accountant will have an arrangement concerning future employment with the corporation that will require her disqualification from participation in any particular matter that will have a direct and predictable effect on the corporation's financial interests.

(b) *Offer rejected or not made.* The agency designee for the purpose of § 2635.502(c) may, in an appropriate case, determine that an employee not covered by the preceding paragraph who has sought but is no longer seeking employment nevertheless shall be subject to a period of disqualification upon the conclusion of employment negotiations. Any such determination shall be based on a consideration of all the relevant factors, including those listed in § 2635.502(d), and a determination that the concern that a reasonable person may question the integrity of the agency's decisionmaking process outweighs the Government's interest in the employee's participation in the particular matter.

*Example 1:* An employee of the Securities and Exchange Commission was relieved of responsibility for an investigation of a broker-dealer while seeking employment with the law firm representing the broker-dealer in that matter. The firm did not offer her the partnership position she sought. Even though she is no longer seeking employment with the firm, she may continue to

be disqualified from participating in the investigation based on a determination by the agency designee that the concern that a reasonable person might question whether, in view of the history of the employment negotiations, she could act impartially in the matter outweighs the Government's interest in her participation.

[57 FR 35042, Aug. 7, 1992, as amended at 62 FR 48748, Sept. 17, 1997; 64 FR 13064, Mar. 17, 1999]

### Subpart G—Misuse of Position

#### § 2635.701 Overview.

This subpart contains provisions relating to the proper use of official time and authority, and of information and resources to which an employee has access because of his Federal employment. This subpart sets forth standards relating to:

- (a) Use of public office for private gain;
- (b) Use of nonpublic information;
- (c) Use of Government property; and
- (d) Use of official time.

#### § 2635.702 Use of public office for private gain.

An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations. The specific prohibitions set forth in paragraphs (a) through (d) of this section apply this general standard, but are not intended to be exclusive or to limit the application of this section.

(a) *Inducement or coercion of benefits.* An employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that is intended to coerce or induce another person, including a subordinate, to provide any benefit, financial or otherwise, to himself or to friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity.

*Example 1:* Offering to pursue a relative's consumer complaint over a household appliance, an employee of the Securities and Exchange Commission called the general counsel of the manufacturer and, in the course of discussing the problem, stated that he worked at the SEC and was responsible for reviewing the company's filings. The employee violated the prohibition against use of public office for private gain by invoking his official authority in an attempt to influence action to benefit his relative.

*Example 2:* An employee of the Department of Commerce was asked by a friend to determine why his firm's export license had not yet been granted by another office within the Department of Commerce. At a department-level staff meeting, the employee raised as a matter for official inquiry the delay in approval of the particular license and asked that the particular license be expedited. The official used her public office in an attempt to benefit her friend and, in acting as her friend's agent for the purpose of pursuing the export license with the Department of Commerce, may also have violated 18 U.S.C. 205.

(b) *Appearance of governmental sanction.* Except as otherwise provided in this part, an employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that could reasonably be construed to imply that his agency or the Government sanctions or endorses his personal activities or those of another. When teaching, speaking, or writing in a personal capacity, he may refer to his official title or position only as permitted by § 2635.807(b). He may sign a letter of recommendation using his official title only in response to a request for an employment recommendation or character reference based upon personal knowledge of the ability or character of an individual with whom he has dealt in the course of Federal employment or whom he is recommending for Federal employment.

*Example 1:* An employee of the Department of the Treasury who is asked to provide a letter of recommendation for a former subordinate on his staff may provide the recommendation using official stationery and may sign the letter using his official title. If, however, the request is for the recommendation of a personal friend with whom he has not dealt in the Government, the employee should not use official stationery or sign the letter of recommendation using his official title, unless the recommendation is for Federal employment. In writing the letter of

## § 2635.703

recommendation for his personal friend, it may be appropriate for the employee to refer to his official position in the body of the letter.

(c) *Endorsements.* An employee shall not use or permit the use of his Government position or title or any authority associated with his public office to endorse any product, service or enterprise except:

(1) In furtherance of statutory authority to promote products, services or enterprises; or

(2) As a result of documentation of compliance with agency requirements or standards or as the result of recognition for achievement given under an agency program of recognition for accomplishment in support of the agency's mission.

*Example 1:* A Commissioner of the Consumer Product Safety Commission may not appear in a television commercial in which she endorses an electrical appliance produced by her former employer, stating that it has been found by the CPSC to be safe for residential use.

*Example 2:* A Foreign Commercial Service officer from the Department of Commerce is asked by a United States telecommunications company to meet with representatives of the Government of Spain, which is in the process of procuring telecommunications services and equipment. The company is bidding against five European companies and the statutory mission of the Department of Commerce includes assisting the export activities of U.S. companies. As part of his official duties, the Foreign Commercial Service officer may meet with Spanish officials and explain the advantages of procurement from the United States company.

*Example 3:* The Administrator of the Environmental Protection Agency may sign a letter to an oil company indicating that its refining operations are in compliance with Federal air quality standards even though he knows that the company has routinely displayed letters of this type in television commercials portraying it as a "trustee of the environment for future generations."

*Example 4:* An Assistant Attorney General may not use his official title or refer to his Government position in a book jacket endorsement of a novel about organized crime written by an author whose work he admires. Nor may he do so in a book review published in a newspaper.

(d) *Performance of official duties affecting a private interest.* To ensure that the performance of his official duties does not give rise to an appearance of use of public office for private gain or of giv-

## 5 CFR Ch. XVI (1-1-16 Edition)

ing preferential treatment, an employee whose duties would affect the financial interests of a friend, relative or person with whom he is affiliated in a nongovernmental capacity shall comply with any applicable requirements of § 2635.502.

(e) *Use of terms of address and ranks.* Nothing in this section prohibits an employee who is ordinarily addressed using a general term of address, such as "The Honorable", or a rank, such as a military or ambassadorial rank, from using that term of address or rank in connection with a personal activity.

### § 2635.703 Use of nonpublic information.

(a) *Prohibition.* An employee shall not engage in a financial transaction using nonpublic information, nor allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure.

(b) *Definition of nonpublic information.* For purposes of this section, *nonpublic information* is information that the employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public. It includes information that he knows or reasonably should know:

(1) Is routinely exempt from disclosure under 5 U.S.C. 552 or otherwise protected from disclosure by statute, Executive order or regulation;

(2) Is designated as confidential by an agency; or

(3) Has not actually been disseminated to the general public and is not authorized to be made available to the public on request.

*Example 1:* A Navy employee learns in the course of her duties that a small corporation will be awarded a Navy contract for electrical test equipment. She may not take any action to purchase stock in the corporation or its suppliers and she may not advise friends or relatives to do so until after public announcement of the award. Such actions could violate Federal securities statutes as well as this section.

*Example 2:* A General Services Administration employee involved in evaluating proposals for a construction contract cannot disclose the terms of a competing proposal to a friend employed by a company bidding on

## Office of Government Ethics

## § 2635.705

the work. Prior to award of the contract, bid or proposal information is nonpublic information specifically protected by 41 U.S.C. 423.

*Example 3:* An employee is a member of a source selection team assigned to review the proposals submitted by several companies in response to an Army solicitation for spare parts. As a member of the evaluation team, the employee has access to proprietary information regarding the production methods of Alpha Corporation, one of the competitors. He may not use that information to assist Beta Company in drafting a proposal to compete for a Navy spare parts contract. The Federal Acquisition Regulation in 48 CFR parts 3, 14 and 15 restricts the release of information related to procurements and other contractor information that must be protected under 18 U.S.C. 1905 and 41 U.S.C. 423.

*Example 4:* An employee of the Nuclear Regulatory Commission inadvertently includes a document that is exempt from disclosure with a group of documents released in response to a Freedom of Information Act request. Regardless of whether the document is used improperly, the employee's disclosure does not violate this section because it was not a knowing unauthorized disclosure made for the purpose of furthering a private interest.

*Example 5:* An employee of the Army Corps of Engineers is actively involved in the activities of an organization whose goals relate to protection of the environment. The employee may not, other than as permitted by agency procedures, give the organization or a newspaper reporter nonpublic information about long-range plans to build a particular dam.

### § 2635.704 Use of Government property.

(a) *Standard.* An employee has a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes.

(b) *Definitions.* For purposes of this section:

(1) *Government property* includes any form of real or personal property in which the Government has an ownership, leasehold, or other property interest as well as any right or other intangible interest that is purchased with Government funds, including the services of contractor personnel. The term includes office supplies, telephone and other telecommunications equipment and services, the Government mails, automated data processing capabilities, printing and reproduction facilities,

ties, Government records, and Government vehicles.

(2) *Authorized purposes* are those purposes for which Government property is made available to members of the public or those purposes authorized in accordance with law or regulation.

*Example 1:* Under regulations of the General Services Administration at 41 CFR 101-35.201, an employee may make a personal long distance call charged to her personal calling card.

*Example 2:* An employee of the Commodity Futures Trading Commission whose office computer gives him access to a commercial service providing information for investors may not use that service for personal investment research.

*Example 3:* In accordance with Office of Personnel Management regulations at part 251 of this title, an attorney employed by the Department of Justice may be permitted to use her office word processor and agency photocopy equipment to prepare a paper to be presented at a conference sponsored by a professional association of which she is a member.

[57 FR 35042, Aug. 7, 1992, as amended at 62 FR 48748, Sept. 17, 1997]

### § 2635.705 Use of official time.

(a) *Use of an employee's own time.* Unless authorized in accordance with law or regulations to use such time for other purposes, an employee shall use official time in an honest effort to perform official duties. An employee not under a leave system, including a Presidential appointee exempted under 5 U.S.C. 6301(2), has an obligation to expend an honest effort and a reasonable proportion of his time in the performance of official duties.

*Example 1:* An employee of the Social Security Administration may use official time to engage in certain representational activities on behalf of the employee union of which she is a member. Under 5 U.S.C. 7131, this is a proper use of her official time even though it does not involve performance of her assigned duties as a disability claims examiner.

*Example 2:* A pharmacist employed by the Department of Veterans Affairs has been granted excused absence to participate as a speaker in a conference on drug abuse sponsored by the professional association to which he belongs. Although excused absence granted by an agency in accordance with guidance in chapter 630 of the Federal Personnel Manual allows an employee to be absent from his official duties without charge

to his annual leave account, such absence is not on official time.

(b) *Use of a subordinate's time.* An employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation.

*Example 1:* An employee of the Department of Housing and Urban Development may not ask his secretary to type his personal correspondence during duty hours. Further, directing or coercing a subordinate to perform such activities during nonduty hours constitutes an improper use of public office for private gain in violation of § 2635.702(a). Where the arrangement is entirely voluntary and appropriate compensation is paid, the secretary may type the correspondence at home on her own time. Where the compensation is not adequate, however, the arrangement would involve a gift to the superior in violation of the standards in subpart C of this part.

## Subpart H—Outside Activities

### § 2635.801 Overview.

(a) This subpart contains provisions relating to outside employment, outside activities and personal financial obligations of employees that are in addition to the principles and standards set forth in other subparts of this part. Several of these provisions apply to uncompensated as well as to compensated outside activities.

(b) An employee who wishes to engage in outside employment or other outside activities must comply with all relevant provisions of this subpart, including, when applicable:

(1) The prohibition on outside employment or any other outside activity that conflicts with the employee's official duties;

(2) Any agency-specific requirement for prior approval of outside employment or activities;

(3) The limitations on receipt of outside earned income by certain Presidential appointees and other noncareer employees;

(4) The limitations on paid and unpaid service as an expert witness;

(5) The limitations on participation in professional organizations;

(6) The limitations on paid and unpaid teaching, speaking, and writing; and

(7) The limitations on fundraising activities.

(c) Outside employment and other outside activities of an employee must also comply with applicable provisions set forth in other subparts of this part and in supplemental agency regulations. These include the principle that an employee shall endeavor to avoid actions creating an appearance of violating any of the ethical standards in this part and the prohibition against use of official position for an employee's private gain or for the private gain of any person with whom he has employment or business relations or is otherwise affiliated in a nongovernmental capacity.

(d) In addition to the provisions of this and other subparts of this part, an employee who wishes to engage in outside employment or other outside activities must comply with applicable statutes and regulations. Relevant provisions of law, many of which are listed in subpart I of this part, may include:

(1) 18 U.S.C. 201(b), which prohibits a public official from seeking, accepting or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act or for being induced to take or omit to take any action in violation of his official duty;

(2) 18 U.S.C. 201(c), which prohibits a public official, otherwise than as provided by law for the proper discharge of official duty, from seeking, accepting, or agreeing to receive or accept anything of value for or because of any official act;

(3) 18 U.S.C. 203(a), which prohibits an employee from seeking, accepting, or agreeing to receive or accept compensation for any representational services, rendered personally or by another, in relation to any particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, or other specified entity. This statute contains several exceptions, as well as standards for special Government employees that limit the scope of the restriction;

(4) 18 U.S.C. 205, which prohibits an employee, whether or not for compensation, from acting as agent or attorney for anyone in a claim against the United States or from acting as agent or attorney for anyone, before any department, agency, or other specified entity, in any particular matter in which the United States is a party or has a direct and substantial interest. It also prohibits receipt of any gratuity, or any share of or interest in a claim against the United States, in consideration for assisting in the prosecution of such claim. This statute contains several exceptions, as well as standards for special Government employees that limit the scope of the restrictions;

(5) 18 U.S.C. 209, which prohibits an employee, other than a special Government employee, from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a Government employee. The statute contains several exceptions that limit its applicability;

(6) The Emoluments Clause of the United States Constitution, article I, section 9, clause 8, which prohibits anyone holding an office of profit or trust under the United States from accepting any gift, office, title or emolument, including salary or compensation, from any foreign government except as authorized by Congress. In addition, 18 U.S.C. 219 generally prohibits any public official from being or acting as an agent of a foreign principal, including a foreign government, corporation or person, if the employee would be required to register as a foreign agent under 22 U.S.C. 611 *et seq.*;

(7) The Hatch Act Reform Amendments, 5 U.S.C. 7321 through 7326, which govern the political activities of executive branch employees; and

(8) The limitations on outside employment, 5 U.S.C. App. (Ethics in Government Act of 1978), which prohibit a covered noncareer employee's receipt of compensation for specified activities and provide that he shall not allow his name to be used by any firm or other entity which provides professional services involving a fiduciary relationship. Implementing regulations are

contained in §§ 2636.305 through 2636.307 of this chapter.

[57 FR 35041, Aug. 7, 1992; 57 FR 48557, Oct. 27, 1992; 61 FR 50691, Sept. 27, 1996; 62 FR 48748, Sept. 17, 1997]

#### **§ 2635.802 Conflicting outside employment and activities.**

An employee shall not engage in outside employment or any other outside activity that conflicts with his official duties. An activity conflicts with an employee's official duties:

(a) If it is prohibited by statute or by an agency supplemental regulation; or

(b) If, under the standards set forth in §§ 2635.402 and 2635.502, it would require the employee's disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired.

Employees are cautioned that even though an outside activity may not be prohibited under this section, it may violate other principles or standards set forth in this part or require the employee to disqualify himself from participation in certain particular matters under either subpart D or subpart E of this part.

*Example 1:* An employee of the Environmental Protection Agency has just been promoted. His principal duty in his new position is to write regulations relating to the disposal of hazardous waste. The employee may not continue to serve as president of a non-profit environmental organization that routinely submits comments on such regulations. His service as an officer would require his disqualification from duties critical to the performance of his official duties on a basis so frequent as to materially impair his ability to perform the duties of his position.

*Example 2:* An employee of the Occupational Safety and Health Administration who was and is expected again to be instrumental in formulating new OSHA safety standards applicable to manufacturers that use chemical solvents has been offered a consulting contract to provide advice to an affected company in restructuring its manufacturing operations to comply with the OSHA standards. The employee should not enter into the consulting arrangement even though he is not currently working on OSHA standards affecting this industry and his consulting contract can be expected to be completed before he again works on such

## § 2635.803

standards. Even though the consulting arrangement would not be a conflicting activity within the meaning of § 2635.802, it would create an appearance that the employee had used his official position to obtain the compensated outside business opportunity and it would create the further appearance of using his public office for the private gain of the manufacturer.

### § 2635.803 Prior approval for outside employment and activities.

When required by agency supplemental regulation issued after February 3, 1993, an employee shall obtain prior approval before engaging in outside employment or activities. Where it is determined to be necessary or desirable for the purpose of administering its ethics program, an agency shall, by supplemental regulation, require employees or any category of employees to obtain prior approval before engaging in specific types of outside activities, including outside employment.

[57 FR 35042, Aug. 7, 1992, as amended at 59 FR 4780, Feb. 2, 1994; 60 FR 6391, Feb. 2, 1995; 60 FR 66858, Dec. 27, 1995; 61 FR 40951, Aug. 7, 1996; 62 FR 48748, Sept. 17, 1997]

### § 2635.804 Outside earned income limitations applicable to certain Presidential appointees and other non-career employees.

(a) *Presidential appointees to full-time noncareer positions.* A Presidential appointee to a full-time noncareer position shall not receive any outside earned income for outside employment, or for any other outside activity, performed during that Presidential appointment. This limitation does not apply to any outside earned income received for outside employment, or for any other outside activity, carried out in satisfaction of the employee's obligation under a contract entered into prior to April 12, 1989.

(b) *Covered noncareer employees.* Covered noncareer employees, as defined in § 2636.303(a) of this chapter, may not, in any calendar year, receive outside earned income attributable to that calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under 5 U.S.C. 5313, as in effect on January 1 of such calendar year. Employees should consult the regulations implementing this limitation, which are contained in

## 5 CFR Ch. XVI (1–1–16 Edition)

§§ 2636.301 through 2636.304 of this chapter.

NOTE: In addition to the 15 percent limitation on outside earned income, covered non-career employees are prohibited from receiving any compensation for: practicing a profession which involves a fiduciary relationship; affiliating with or being employed by a firm or other entity which provides professional services involving a fiduciary relationship; serving as an officer or member of the board of any association, corporation or other entity; or teaching without prior approval. Implementing regulations are contained in §§ 2636.305 through 2636.307 of this chapter.

(c) *Definitions.* For purposes of this section:

(1) *Outside earned income* has the meaning set forth in § 2636.303(b) of this chapter, except that § 2636.303(b)(7) shall not apply.

(2) *Presidential appointee to a full-time noncareer position* means any employee who is appointed by the President to a full-time position described in 5 U.S.C. 5312 through 5317 or to a position that, by statute or as a matter of practice, is filled by Presidential appointment, other than:

(i) A position filled under the authority of 3 U.S.C. 105 or 3 U.S.C. 107(a) for which the rate of basic pay is less than that for GS-9, step 1 of the General Schedule;

(ii) A position, within a White House operating unit, that is designated as not normally subject to change as a result of a Presidential transition;

(iii) A position within the uniformed services; or

(iv) A position in which a member of the foreign service is serving that does not require advice and consent of the Senate.

*Example 1:* A career Department of Justice employee who is detailed to a policy-making position in the White House Office that is ordinarily filled by a noncareer employee is not a Presidential appointee to a full-time noncareer position.

*Example 2:* A Department of Energy employee appointed under § 213.3301 of this title to a Schedule C position is appointed by the agency and, thus, is not a Presidential appointee to a full-time noncareer position.

[57 FR 35042, Aug. 7, 1992, as amended at 72 FR 16987, Apr. 6, 2007]



## Office of Government Ethics

## § 2635.807

### § 2635.805 Service as an expert witness.

(a) *Restriction.* An employee shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which the United States is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency under paragraph (c) of this section. Except as provided in paragraph (b) of this section, this restriction shall apply to a special Government employee only if he has participated as an employee or special Government employee in the particular proceeding or in the particular matter that is the subject of the proceeding.

(b) *Additional restriction applicable to certain special Government employees.* (1) In addition to the restriction described in paragraph (a) of this section, a special Government employee described in paragraph (b)(2) of this section shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which his employing agency is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency under paragraph (c) of this section.

(2) The restriction in paragraph (b)(1) of this section shall apply to a special Government employee who:

- (i) Is appointed by the President;
- (ii) Serves on a commission established by statute; or
- (iii) Has served or is expected to serve for more than 60 days in a period of 365 consecutive days.

(c) *Authorization to serve as an expert witness.* Provided that the employee's testimony will not violate any of the principles or standards set forth in this part, authorization to provide expert witness service otherwise prohibited by paragraphs (a) and (b) of this section may be given by the designated agency ethics official of the agency in which the employee serves when:

(1) After consultation with the agency representing the Government in the proceeding or, if the Government is not a party, with the Department of Jus-

tice and the agency with the most direct and substantial interest in the matter, the designated agency ethics official determines that the employee's service as an expert witness is in the interest of the Government; or

(2) The designated agency ethics official determines that the subject matter of the testimony does not relate to the employee's official duties within the meaning of § 2635.807(a)(2)(i).

(d) Nothing in this section prohibits an employee from serving as a fact witness when subpoenaed by an appropriate authority.

[57 FR 35042, Aug. 7, 1992, as amended at 62 FR 48748, Sept. 17, 1997]

### § 2635.806 Participation in professional associations. [Reserved]

### § 2635.807 Teaching, speaking and writing.

(a) *Compensation for teaching, speaking or writing.* Except as permitted by paragraph (a)(3) of this section, an employee, including a special Government employee, shall not receive compensation from any source other than the Government for teaching, speaking or writing that relates to the employee's official duties.

(1) *Relationship to other limitations on receipt of compensation.* The compensation prohibition contained in this section is in addition to any other limitation on receipt of compensation set forth in this chapter, including:

(i) The requirement contained in § 2636.307 of this chapter that covered noncareer employees obtain advance authorization before engaging in teaching for compensation; and

(ii) The prohibitions and limitations in § 2635.804 and in § 2636.304 of this chapter on receipt of outside earned income applicable to certain Presidential appointees and to other covered non-career employees.

(2) *Definitions.* For purposes of this paragraph:

(i) Teaching, speaking or writing relates to the employee's official duties if:

(A) The activity is undertaken as part of the employee's official duties;

(B) The circumstances indicate that the invitation to engage in the activity

was extended to the employee primarily because of his official position rather than his expertise on the particular subject matter;

(C) The invitation to engage in the activity or the offer of compensation for the activity was extended to the employee, directly or indirectly, by a person who has interests that may be affected substantially by performance or nonperformance of the employee's official duties;

(D) The information conveyed through the activity draws substantially on ideas or official data that are nonpublic information as defined in § 2635.703(b); or

(E) Except as provided in paragraph (a)(2)(i)(E)(4) of this section, the subject of the activity deals in significant part with:

(1) Any matter to which the employee presently is assigned or to which the employee had been assigned during the previous one-year period;

(2) Any ongoing or announced policy, program or operation of the agency; or

(3) In the case of a noncareer employee as defined in § 2636.303(a) of this chapter, the general subject matter area, industry, or economic sector primarily affected by the programs and operations of his agency.

(4) The restrictions in paragraphs (a)(2)(i)(E) (2) and (3) of this section do not apply to a special Government employee. The restriction in paragraph (a)(2)(i)(E)(1) of this section applies only during the current appointment of a special Government employee; except that if the special Government employee has not served or is not expected to serve for more than 60 days during the first year or any subsequent one year period of that appointment, the restriction applies only to particular matters involving specific parties in which the special Government employee has participated or is participating personally and substantially.

NOTE: Section 2635.807(a)(2)(i)(E) does not preclude an employee, other than a covered noncareer employee, from receiving compensation for teaching, speaking or writing on a subject within the employee's discipline or inherent area of expertise based on his educational background or experience even though the teaching, speaking or writing deals generally with a subject within the agency's areas of responsibility.

*Example 1:* The Director of the Division of Enforcement at the Commodity Futures Trading Commission has a keen interest in stamp collecting and has spent years developing his own collection as well as studying the field generally. He is asked by an international society of philatelists to give a series of four lectures on how to assess the value of American stamps. Because the subject does not relate to his official duties, the Director may accept compensation for the lecture series. He could not, however, accept a similar invitation from a commodities broker.

*Example 2:* A scientist at the National Institutes of Health, whose principal area of Government research is the molecular basis of the development of cancer, could not be compensated for writing a book which focuses specifically on the research she conducts in her position at NIH, and thus, relates to her official duties. However, the scientist could receive compensation for writing or editing a textbook on the treatment of all cancers, provided that the book does not focus on recent research at NIH, but rather conveys scientific knowledge gleaned from the scientific community as a whole. The book might include a chapter, among many other chapters, which discusses the molecular basis of cancer development. Additionally, the book could contain brief discussions of recent developments in cancer treatment, even though some of those developments are derived from NIH research, as long as it is available to the public.

*Example 3:* On his own time, a National Highway Traffic Safety Administration employee prepared a consumer's guide to purchasing a safe automobile that focuses on automobile crash worthiness statistics gathered and made public by NHTSA. He may not receive royalties or any other form of compensation for the guide. The guide deals in significant part with the programs or operations of NHTSA and, therefore, relates to the employee's official duties. On the other hand, the employee could receive royalties from the sale of a consumer's guide to values in used automobiles even though it contains a brief, incidental discussion of automobile safety standards developed by NHTSA.

*Example 4:* An employee of the Securities and Exchange Commission may not receive compensation for a book which focuses specifically on the regulation of the securities industry in the United States, since that subject concerns the regulatory programs or operations of the SEC. The employee may, however, write a book about the advantages of investing in various types of securities as long as the book contains only an incidental discussion of any program or operation of the SEC.

*Example 5:* An employee of the Department of Commerce who works in the Department's employee relations office is an acknowledged

expert in the field of Federal employee labor relations, and participates in Department negotiations with employee unions. The employee may receive compensation from a private training institute for a series of lectures which describe the decisions of the Federal Labor Relations Authority concerning unfair labor practices, provided that her lectures do not contain any significant discussion of labor relations cases handled at the Department of Commerce, or the Department's labor relations policies. Federal Labor Relations Authority decisions concerning Federal employee unfair labor practices are not a specific program or operation of the Department of Commerce and thus do not relate to the employee's official duties. However, an employee of the FLRA could not give the same presentations for compensation.

*Example 6:* A program analyst employed at the Environmental Protection Agency may receive royalties and other compensation for a book about the history of the environmental movement in the United States even though it contains brief references to the creation and responsibilities of the EPA. A covered noncareer employee of the EPA, however, could not receive compensation for writing the same book because it deals with the general subject matter area affected by EPA programs and operations. Neither employee could receive compensation for writing a book that focuses on specific EPA regulations or otherwise on its programs and operations.

*Example 7:* An attorney in private practice has been given a one year appointment as a special Government employee to serve on an advisory committee convened for the purpose of surveying and recommending modification of procurement regulations that deter small businesses from competing for Government contracts. Because his service under that appointment is not expected to exceed 60 days, the attorney may accept compensation for an article about the anti-competitive effects of certain regulatory certification requirements even though those regulations are being reviewed by the advisory committee. The regulations which are the focus of the advisory committee deliberations are not a particular matter involving specific parties. Because the information is nonpublic, he could not, however, accept compensation for an article which recounts advisory committee deliberations that took place in a meeting closed to the public in order to discuss proprietary information provided by a small business.

*Example 8:* A biologist who is an expert in marine life is employed for more than 60 days in a year as a special Government employee by the National Science Foundation to assist in developing a program of grants by the Foundation for the study of coral reefs. The biologist may continue to receive

compensation for speaking, teaching and writing about marine life generally and coral reefs specifically. However, during the term of her appointment as a special Government employee, she may not receive compensation for an article about the NSF program she is participating in developing. Only the latter would concern a matter to which the special Government employee is assigned.

*Example 9:* An expert on international banking transactions has been given a one-year appointment as a special Government employee to assist in analyzing evidence in the Government's fraud prosecution of owners of a failed savings and loan association. It is anticipated that she will serve fewer than 60 days under that appointment. Nevertheless, during her appointment, the expert may not accept compensation for an article about the fraud prosecution, even though the article does not reveal nonpublic information. The prosecution is a particular matter that involves specific parties.

(ii) *Agency* has the meaning set forth in § 2635.102(a), except that any component of a department designated as a separate agency under § 2635.203(a) shall be considered a separate agency.

(iii) *Compensation* includes any form of consideration, remuneration or income, including royalties, given for or in connection with the employee's teaching, speaking or writing activities. Unless accepted under specific statutory authority, such as 31 U.S.C. 1353, 5 U.S.C. 4111 or 7342, or an agency gift acceptance statute, it includes transportation, lodgings and meals, whether provided in kind, by purchase of a ticket, by payment in advance or by reimbursement after the expense has been incurred. It does not include:

(A) Items offered by any source that could be accepted from a prohibited source under subpart B of this part;

(B) Meals or other incidents of attendance such as waiver of attendance fees or course materials furnished as part of the event at which the teaching or speaking takes place;

(C) Copies of books or of publications containing articles, reprints of articles, tapes of speeches, and similar items that provide a record of the teaching, speaking or writing activity; or

(D) In the case of an employee other than a covered noncareer employee as defined in 5 CFR 2636.303(a), travel expenses, consisting of transportation,

## § 2635.807

## 5 CFR Ch. XVI (1–1–16 Edition)

lodgings or meals, incurred in connection with the teaching, speaking or writing activity.

NOTE TO PARAGRAPH (a)(2)(iii): Independent of § 2635.807(a), other authorities, such as 18 U.S.C. 209, in some circumstances may limit or entirely preclude an employee's acceptance of travel expenses. In addition, employees who file financial disclosure reports should be aware that, subject to applicable thresholds and exclusions, travel and travel reimbursements accepted from sources other than the United States Government must be reported on their financial disclosure reports.

*Example 1 to paragraph (a)(2)(iii):* A GS–15 employee of the Forest Service has developed and marketed, in her private capacity, a speed reading technique for which popular demand is growing. She is invited to speak about the technique by a representative of an organization that will be substantially affected by a regulation on land management which the employee is in the process of drafting for the Forest Service. The representative offers to pay the employee a \$200 speaker's fee and to reimburse all her travel expenses. She may accept the travel reimbursements, but not the speaker's fee. The speaking activity is related to her official duties under § 2635.807(a)(2)(i)(C) and the fee is prohibited compensation for such speech; travel expenses incurred in connection with the speaking engagement, on the other hand, are not prohibited compensation for a GS–15 employee.

*Example 2 to paragraph (a)(2)(iii):* Solely because of her recent appointment to a Cabinet-level position, a Government official is invited by the Chief Executive Officer of a major international corporation to attend firm meetings to be held in Aspen for the purpose of addressing senior corporate managers on the importance of recreational activities to a balanced lifestyle. The firm offers to reimburse the official's travel expenses. The official may not accept the offer. The speaking activity is related to official duties under § 2635.807(a)(2)(i)(B) and, because she is a covered noncareer employee as defined in § 2636.303(a) of this chapter, the travel expenses are prohibited compensation as to her.

*Example 3 to paragraph (a)(2)(iii):* A GS–14 attorney at the Federal Trade Commission (FTC) who played a lead role in a recently concluded merger case is invited to speak about the case, in his private capacity, at a conference in New York. The attorney has no public speaking responsibilities on behalf of the FTC apart from the judicial and administrative proceedings to which he is assigned. The sponsors of the conference offer to reimburse the attorney for expenses incurred in connection with his travel to New York. They also offer him, as compensation for his

time and effort, a free trip to San Francisco. The attorney may accept the travel expenses to New York, but not the expenses to San Francisco. The lecture relates to his official duties under paragraphs (a)(2)(i)(E)(I) and (a)(2)(i)(E)(2) of § 2635.807, but because he is not a covered noncareer employee as defined in § 2636.303(a) of this chapter, the expenses associated with his travel to New York are not a prohibited form of compensation as to him. The travel expenses to San Francisco, on the other hand, not incurred in connection with the speaking activity, are a prohibited form of compensation. If the attorney were a covered noncareer employee he would be barred from accepting the travel expenses to New York as well as the travel expenses to San Francisco.

*Example 4 to paragraph (a)(2)(iii):* An advocacy group dedicated to improving treatments for severe pain asks the National Institutes of Health (NIH) to provide a conference speaker who can discuss recent advances in the agency's research on pain. The group also offers to pay the employee's travel expenses to attend the conference. After performing the required conflict of interest analysis, NIH authorizes acceptance of the travel expenses under 31 U.S.C. 1353 and the implementing General Services Administration regulation, as codified under 41 CFR chapter 304, and authorizes an employee to undertake the travel. At the conference the advocacy group, as agreed, pays the employee's hotel bill and provides several of his meals. Subsequently the group reimburses the agency for the cost of the employee's airfare and some additional meals. All of the payments by the advocacy group are permissible. Since the employee is speaking officially and the expense payments are accepted under 31 U.S.C. 1353, they are not prohibited compensation under § 2635.807(a)(2)(iii). The same result would obtain with respect to expense payments made by non-Government sources properly authorized under an agency gift acceptance statute, the Government Employees Training Act, 5 U.S.C. 4111, or the foreign gifts law, 5 U.S.C. 7342.

(iv) *Receive* means that there is actual or constructive receipt of the compensation by the employee so that the employee has the right to exercise dominion and control over the compensation and to direct its subsequent use. Compensation received by an employee includes compensation which is:

(A) Paid to another person, including a charitable organization, on the basis of designation, recommendation or other specification by the employee; or

(B) Paid with the employee's knowledge and acquiescence to his parent,

sibling, spouse, child, or dependent relative.

(v) *Particular matter involving specific parties* has the meaning set forth in § 2637.102(a)(7) of this chapter.

(vi) *Personal and substantial participation* has the meaning set forth in § 2635.402(b)(4).

(3) *Exception for teaching certain courses.* Notwithstanding that the activity would relate to his official duties under paragraphs (a)(2)(i) (B) or (E) of this section, an employee may accept compensation for teaching a course requiring multiple presentations by the employee if the course is offered as part of:

(i) The regularly established curriculum of:

(A) An institution of higher education as defined at 20 U.S.C. 1141(a);

(B) An elementary school as defined at 20 U.S.C. 2891(8); or

(C) A secondary school as defined at 20 U.S.C. 2891(21); or

(ii) A program of education or training sponsored and funded by the Federal Government or by a State or local government which is not offered by an entity described in paragraph (a)(3)(i) of this section.

*Example 1:* An employee of the Cost Accounting Standards Board who teaches an advanced accounting course as part of the regular business school curriculum of an accredited university may receive compensation for teaching the course even though a substantial portion of the course deals with cost accounting principles applicable to contracts with the Government.

*Example 2:* An attorney employed by the Equal Employment Opportunity Commission may accept compensation for teaching a course at a state college on the subject of Federal employment discrimination law. The attorney could not accept compensation for teaching the same seminar as part of a continuing education program sponsored by her bar association because the subject of the course is focused on the operations or programs of the EEOC and the sponsor of the course is not an accredited educational institution.

*Example 3:* An employee of the National Endowment for the Humanities is invited by a private university to teach a course that is a survey of Government policies in support of artists, poets and writers. As part of his official duties, the employee administers a grant that the university has received from the NEH. The employee may not accept compensation for teaching the course because

the university has interests that may be substantially affected by the performance or nonperformance of the employee's duties. Likewise, an employee may not receive compensation for any teaching that is undertaken as part of his official duties or that involves the use of nonpublic information.

(b) *Reference to official position.* An employee who is engaged in teaching, speaking or writing as outside employment or as an outside activity shall not use or permit the use of his official title or position to identify him in connection with his teaching, speaking or writing activity or to promote any book, seminar, course, program or similar undertaking, except that:

(1) An employee may include or permit the inclusion of his title or position as one of several biographical details when such information is given to identify him in connection with his teaching, speaking or writing, provided that his title or position is given no more prominence than other significant biographical details;

(2) An employee may use, or permit the use of, his title or position in connection with an article published in a scientific or professional journal, provided that the title or position is accompanied by a reasonably prominent disclaimer satisfactory to the agency stating that the views expressed in the article do not necessarily represent the views of the agency or the United States; and

(3) An employee who is ordinarily addressed using a general term of address, such as "The Honorable," or a rank, such as a military or ambassadorial rank, may use or permit the use of that term of address or rank in connection with his teaching, speaking or writing.

NOTE: Some agencies may have policies requiring advance agency review, clearance, or approval of certain speeches, books, articles or similar products to determine whether the product contains an appropriate disclaimer, discloses nonpublic information, or otherwise complies with this section.

*Example 1:* A meteorologist employed with the National Oceanic and Atmospheric Administration is asked by a local university to teach a graduate course on hurricanes. The university may include the meteorologist's Government title and position together with other information about his education and previous employment in course materials setting forth biographical data on

all teachers involved in the graduate program. However, his title or position may not be used to promote the course, for example, by featuring the meteorologist's Government title, Senior Meteorologist, NOAA, in bold type under his name. In contrast, his title may be used in this manner when the meteorologist is authorized by NOAA to speak in his official capacity.

*Example 2:* A doctor just employed by the Centers for Disease Control has written a paper based on his earlier independent research into cell structures. Incident to the paper's publication in the Journal of the American Medical Association, the doctor may be given credit for the paper, as Dr. M. Wellbeing, Associate Director, Centers for Disease Control, provided that the article also contains a disclaimer, concurred in by the CDC, indicating that the paper is the result of the doctor's independent research and does not represent the findings of the CDC.

*Example 3:* An employee of the Federal Deposit Insurance Corporation has been asked to give a speech in his private capacity, without compensation, to the annual meeting of a committee of the American Bankers Association on the need for banking reform. The employee may be described in his introduction at the meeting as an employee of the Federal Deposit Insurance Corporation provided that other pertinent biographical details are mentioned as well.

[57 FR 35042, Aug. 7, 1992; 57 FR 48557, Oct. 27, 1992, as amended at 62 FR 48748, Sept. 17, 1997; 65 FR 53652, Sept. 5, 2000; 66 FR 59674, Nov. 30, 2001]

**§ 2635.808 Fundraising activities.**

An employee may engage in fundraising only in accordance with the restrictions in part 950 of this title on the conduct of charitable fundraising in the Federal workplace and in accordance with paragraphs (b) and (c) of this section.

(a) *Definitions.* For purposes of this section: (1) *Fundraising* means the raising of funds for a nonprofit organization, other than a political organization as defined in 26 U.S.C. 527(e), through:

(i) Solicitation of funds or sale of items; or

(ii) Participation in the conduct of an event by an employee where any portion of the cost of attendance or participation may be taken as a charitable tax deduction by a person incurring that cost.

(2) *Participation in the conduct of an event* means active and visible participation in the promotion, production, or

presentation of the event and includes serving as honorary chairperson, sitting at a head table during the event, and standing in a reception line. The term does not include mere attendance at an event provided that, to the employee's knowledge, his attendance is not used by the nonprofit organization to promote the event. While the term generally includes any public speaking during the event, it does not include the delivery of an official speech as defined in paragraph (a)(3) of this section or any seating or other participation appropriate to the delivery of such a speech. Waiver of a fee for attendance at an event by a participant in the conduct of that event does not constitute a gift for purposes of subpart B of this part.

NOTE: This section does not prohibit fundraising for a political party, candidate for partisan political office, or partisan political group. However, there are statutory restrictions that apply to political fundraising. For example, under the Hatch Act Reform Amendments of 1993, at 5 U.S.C. 7323(a), employees may not knowingly solicit, accept, or receive a political contribution from any person, except under limited circumstances. In addition, employees are prohibited by 18 U.S.C. 607 from soliciting or receiving political contributions in Federal offices, and, except as permitted by the Hatch Act Reform Amendments, are prohibited by 18 U.S.C. 602 from knowingly soliciting political contributions from other employees.

*Example 1:* The Secretary of Transportation has been asked to serve as master of ceremonies for an All-Star Gala. Tickets to the event cost \$150 and are tax deductible as a charitable donation, with proceeds to be donated to a local hospital. By serving as master of ceremonies, the Secretary would be participating in fundraising.

(3) *Official speech* means a speech given by an employee in his official capacity on a subject matter that relates to his official duties, provided that the employee's agency has determined that the event at which the speech is to be given provides an appropriate forum for the dissemination of the information to be presented and provided that the employee does not request donations or other support for the nonprofit organization. Subject matter relates to an employee's official duties if it focuses specifically on the employee's official duties, on the responsibilities,

## Office of Government Ethics

## § 2635.808

programs, or operations of the employee's agency as described in § 2635.807(a)(2)(i)(E), or on matters of Administration policy on which the employee has been authorized to speak.

*Example 1:* The Secretary of Labor is invited to speak at a banquet honoring a distinguished labor leader, the proceeds of which will benefit a nonprofit organization that assists homeless families. She devotes a major portion of her speech to the Administration's Points of Light initiative, an effort to encourage citizens to volunteer their time to help solve serious social problems. Because she is authorized to speak on Administration policy, her remarks at the banquet are an official speech. However, the Secretary would be engaged in fundraising if she were to conclude her official speech with a request for donations to the nonprofit organization.

*Example 2:* A charitable organization is sponsoring a two-day tennis tournament at a country club in the Washington, DC area to raise funds for recreational programs for learning disabled children. The organization has invited the Secretary of Education to give a speech on federally funded special education programs at the awards dinner to be held at the conclusion of the tournament and a determination has been made that the dinner is an appropriate forum for the particular speech. The Secretary may speak at the dinner and, under § 2635.204(g)(1), he may partake of the meal provided to him at the dinner.

(4) *Personally solicit* means to request or otherwise encourage donations or other support either through person-to-person contact or through the use of one's name or identity in correspondence or by permitting its use by others. It does not include the solicitation of funds through the media or through either oral remarks, or the contemporaneous dispatch of like items of mass-produced correspondence, if such remarks or correspondence are addressed to a group consisting of many persons, unless it is known to the employee that the solicitation is targeted at subordinates or at persons who are prohibited sources within the meaning of § 2635.203(d). It does not include behind-the-scenes assistance in the solicitation of funds, such as drafting correspondence, stuffing envelopes, or accounting for contributions.

*Example 1:* An employee of the Department of Energy who signs a letter soliciting funds for a local private school does not "personally solicit" funds when 500 copies of the let-

ter, which makes no mention of his DOE position and title, are mailed to members of the local community, even though some individuals who are employed by Department of Energy contractors may receive the letter.

(b) *Fundraising in an official capacity.* An employee may participate in fundraising in an official capacity if, in accordance with a statute, Executive order, regulation or otherwise as determined by the agency, he is authorized to engage in the fundraising activity as part of his official duties. When authorized to participate in an official capacity, an employee may use his official title, position and authority.

*Example 1:* Because participation in his official capacity is authorized under part 950 of this title, the Secretary of the Army may sign a memorandum to all Army personnel encouraging them to donate to the Combined Federal Campaign.

(c) *Fundraising in a personal capacity.* An employee may engage in fundraising in his personal capacity provided that he does not:

(1) Personally solicit funds or other support from a subordinate or from any person:

(i) Known to the employee, if the employee is other than a special Government employee, to be a prohibited source within the meaning of § 2635.203(d); or

(ii) Known to the employee, if the employee is a special Government employee, to be a prohibited source within the meaning of § 2635.203(d)(4) that is a person whose interests may be substantially affected by performance or non-performance of his official duties;

(2) Use or permit the use of his official title, position or any authority associated with his public office to further the fundraising effort, except that an employee who is ordinarily addressed using a general term of address, such as "The Honorable," or a rank, such as a military or ambassadorial rank, may use or permit the use of that term of address or rank for such purposes; or

(3) Engage in any action that would otherwise violate this part.

*Example 1:* A nonprofit organization is sponsoring a golf tournament to raise funds for underprivileged children. The Secretary of the Navy may not enter the tournament

with the understanding that the organization intends to attract participants by offering other entrants the opportunity, in exchange for a donation in the form of an entry fee, to spend the day playing 18 holes of golf in a foursome with the Secretary of the Navy.

*Example 2:* An employee of the Merit Systems Protection Board may not use the agency's photocopier to reproduce fundraising literature for her son's private school. Such use of the photocopier would violate the standards at §2635.704 regarding use of Government property.

*Example 3:* An Assistant Attorney General may not sign a letter soliciting funds for a homeless shelter as "John Doe, Assistant Attorney General." He also may not sign a letter with just his signature, "John Doe," soliciting funds from a prohibited source, unless the letter is one of many identical, mass-produced letters addressed to a large group where the solicitation is not known to him to be targeted at persons who are either prohibited sources or subordinates.

[57 FR 35041, Aug. 7, 1992; 57 FR 48557, Oct. 27, 1992; 61 FR 50691, Sept. 27, 1996]

**§ 2635.809 Just financial obligations.**

Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those such as Federal, State, or local taxes that are imposed by law. For purposes of this section, a just financial obligation includes any financial obligation acknowledged by the employee or reduced to judgment by a court. In good faith means an honest intention to fulfill any just financial obligation in a timely manner. In the event of a dispute between an employee and an alleged creditor, this section does not require an agency to determine the validity or amount of the disputed debt or to collect a debt on the alleged creditor's behalf.

**Subpart I—Related Statutory Authorities**

**§ 2635.901 General.**

In addition to the standards of ethical conduct set forth in subparts A through H of this part, there are a number of statutes that establish standards to which an employee's conduct must conform. The list set forth in §2635.902 references some of the more significant of those statutes. It is not comprehensive and includes only ref-

erences to statutes of general applicability. While it includes references to several of the basic conflict of interest statutes whose standards are explained in more detail throughout this part, it does not include references to statutes of more limited applicability, such as statutes that apply only to officers and employees of the Department of Defense.

**§ 2635.902 Related statutes.**

(a) The prohibition against solicitation or receipt of bribes (18 U.S.C. 201(b)).

(b) The prohibition against solicitation or receipt of illegal gratuities (18 U.S.C. 201(c)).

(c) The prohibition against seeking or receiving compensation for certain representational services before the Government (18 U.S.C. 203).

(d) The prohibition against assisting in the prosecution of claims against the Government or acting as agent or attorney before the Government (18 U.S.C. 205).

(e) The post-employment restrictions applicable to former employees (18 U.S.C. 207, with implementing regulations at parts 2637 and 2641 of this chapter).

(f) The prohibition on certain former agency officials' acceptance of compensation from a contractor (41 U.S.C. 423(d)).

(g) The prohibition against participating in matters affecting an employee's own financial interests or the financial interests of other specified persons or organizations (18 U.S.C. 208).

(h) The actions required of certain agency officials when they contact, or are contacted by, offerors or bidders regarding non-Federal employment (41 U.S.C. 423(c)).

(i) The prohibition against receiving salary or any contribution to or supplementation of salary as compensation for Government service from a source other than the United States (18 U.S.C. 209).

(j) The prohibition against gifts to superiors (5 U.S.C. 7351).

(k) The prohibition against solicitation or receipt of gifts from specified prohibited sources (5 U.S.C. 7353).



(l) The prohibition against fraudulent access and related activity in connection with computers (18 U.S.C. 1030).

(m) The provisions governing receipt and disposition of foreign gifts and decorations (5 U.S.C. 7342).

(n) [Reserved]

(o) The prohibitions against certain political activities (5 U.S.C. 7321 through 7326 and 18 U.S.C. 602, 603, 606 and 607).

(p) The prohibitions against disloyalty and striking (5 U.S.C. 7311 and 18 U.S.C. 1918).

(q) The general prohibition (18 U.S.C. 219) against acting as the agent of a foreign principal required to register under the Foreign Agents Registration Act (22 U.S.C. 611 through 621).

(r) The prohibition against employment of a person convicted of participating in or promoting a riot or civil disorder (5 U.S.C. 7313).

(s) The prohibition against employment of an individual who habitually uses intoxicating beverages to excess (5 U.S.C. 7352).

(t) The prohibition against misuse of a Government vehicle (31 U.S.C. 1344).

(u) The prohibition against misuse of the franking privilege (18 U.S.C. 1719).

(v) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(w) The prohibition against concealing, mutilating or destroying a public record (18 U.S.C. 2071).

(x) The prohibition against counterfeiting or forging transportation requests (18 U.S.C. 508).

(y) The restrictions on disclosure of certain sensitive Government information under the Freedom of Information Act and the Privacy Act (5 U.S.C. 552 and 552a).

(z) The prohibitions against disclosure of classified information (18 U.S.C. 798 and 50 U.S.C. 783(a)).

(aa) The prohibition against disclosure of proprietary information and certain other information of a confidential nature (18 U.S.C. 1905).

(bb) The prohibitions on disclosing and obtaining certain procurement information (41 U.S.C. 423(a) and (b)).

(cc) The prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(dd) The prohibition against certain personnel practices (5 U.S.C. 2302).

(ee) The prohibition against interference with civil service examinations (18 U.S.C. 1917).

(ff) The restrictions on use of public funds for lobbying (18 U.S.C. 1913).

(gg) The prohibition against participation in the appointment or promotion of relatives (5 U.S.C. 3110).

(hh) The prohibition against solicitation or acceptance of anything of value to obtain public office for another (18 U.S.C. 211).

(ii) The prohibition against conspiracy to commit an offense against or to defraud the United States (18 U.S.C. 371).

(jj) The prohibition against embezzlement or conversion of Government money or property (18 U.S.C. 641).

(kk) The prohibition against failing to account for public money (18 U.S.C. 643).

(ll) The prohibition against embezzlement of the money or property of another person that is in the possession of an employee by reason of his employment (18 U.S.C. 654).

[57 FR 35042, Aug. 7, 1992, as amended at 62 FR 48748, Sept. 17, 1997; 64 FR 2422, Jan. 14, 1999; 65 FR 69657, Nov. 20, 2000]

## **PART 2636—LIMITATIONS ON OUTSIDE EARNED INCOME, EMPLOYMENT AND AFFILIATIONS FOR CERTAIN NONCAREER EMPLOYEES**

### **Subpart A—General Provisions**

Sec.	Purpose.
2636.101	Purpose.
2636.102	Definitions.
2636.103	Advisory opinions.
2636.104	Civil, disciplinary and other action.

### **Subpart B [Reserved]**

### **Subpart C—Outside Earned Income Limitation and Employment and Affiliation Restrictions Applicable to Certain Non-career Employees**

2636.301	General standards.
2636.302	Relationship to other laws and regulations.
2636.303	Definitions.
2636.304	The 15 percent limitation on outside earned income.

## § 2636.101

2636.305 Compensation and other restrictions relating to professions involving a fiduciary relationship.

2636.306 Compensation restriction applicable to service as an officer or member of a board.

2636.307 Requirement for advance authorization to engage in teaching for compensation.

AUTHORITY: 5 U.S.C. App. (Ethics in Government Act of 1978); Pub. L. 101-410, 104 Stat. 890, 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990), as amended by Sec. 31001, Pub. L. 104-134, 110 Stat. 1321 (Debt Collection Improvement Act of 1996); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

SOURCE: 56 FR 1723, Jan. 17, 1991, unless otherwise noted.

### Subpart A—General Provisions

#### § 2636.101 Purpose.

This part is issued under authority of title VI of the Ethics Reform Act of 1989 (Pub. L. 101-194, as amended), to implement the 15 percent outside earned income limitation at 5 U.S.C. app. 501(a) and the limitations at 5 U.S.C. app. 502 on outside employment and affiliations, which are applicable to certain noncareer employees.

[63 FR 43068, Aug. 12, 1998]

#### § 2636.102 Definitions.

The definitions listed below are of general applicability to this part. Additional definitions of narrower applicability appear in the subparts or sections of subparts to which they apply. For purposes of this part:

(a) *Agency ethics official* refers to the designated agency ethics official and to any deputy ethics official described in § 2638.204 of this subchapter to whom authority to issue advisory opinions under § 2636.103 of this part has been delegated by the designated agency ethics official.

(b) *Designated agency ethics official* refers to the official described in § 2638.201 of this subchapter.

(c) *Employee* means any officer or employee of the executive branch, other than a special Government employee as defined in 18 U.S.C. 202. It includes officers but not enlisted members of the uniformed services as defined in 5

## 5 CFR Ch. XVI (1-1-16 Edition)

U.S.C. 2101(3). It does not include the President or Vice President.

(d) *Executive branch* includes each executive agency as defined in 5 U.S.C. 105 and any other entity or administrative unit in the executive branch. However, it does not include any agency that is defined by 5 U.S.C. app. 109(11) as within the legislative branch.

(e) The terms *he*, *his*, and *him* include “she,” “hers” and “her.”

[56 FR 1723, Jan. 17, 1991, as amended at 63 FR 43068, Aug. 12, 1998]

#### § 2636.103 Advisory opinions.

(a) *Request for an advisory opinion.* (1) An employee may request an advisory opinion from an agency ethics official as to whether specific conduct which has not yet occurred would violate any provision contained in this part.

(2) An advisory opinion may not be obtained for the purpose of establishing whether a noncareer employee who is subject to the restrictions in subpart C of this part may receive compensation for teaching. An advisory opinion issued under this section may not be substituted for the advance written approval required by § 2636.307 of this part.

(3) The employee's request for an advisory opinion shall be submitted in writing, shall be dated and signed, and shall include all information reasonably available to the employee that is relevant to the inquiry. Where, in the opinion of the agency ethics official, complete information has not been provided, that official may request the employee to furnish additional information necessary to issue an opinion.

(b) *Issuance of advisory opinion.* As soon as practicable after receipt of all necessary information, the agency ethics official shall issue a written opinion as to whether the conduct in issue would violate any provision contained in this part. Where conduct which would not violate this part would violate another statute relating to conflicts of interest or applicable standards of conduct, the advisory opinion shall so state and shall caution the employee against engaging in the conduct.

(1) For the purpose of issuing an advisory opinion, the agency ethics official may request additional information

from agency sources, including the requesting employee's supervisor, and may rely upon the accuracy of information furnished by the requester or any agency source unless he has reason to believe that the information is fraudulent, misleading or otherwise incorrect.

(2) A copy of the request and advisory opinion shall be retained for a period of 6 years.

(c) *Good faith reliance on an advisory opinion.* An employee who engages in conduct in good faith reliance upon an advisory opinion issued to him under this section shall not be subject to civil or disciplinary action for having violated this part. Where an employee engages in conduct in good faith reliance upon an advisory opinion issued by an ethics official of his agency to another, neither the Office of Government Ethics nor the employing agency shall initiate civil or disciplinary action under this part for conduct that is indistinguishable in all material aspects from the conduct described in the advisory opinion. However, an advisory opinion issued under this section shall not insulate the employee from other civil or disciplinary action if his conduct violates any other laws, rule, regulation or lawful management policy or directive. Where an employee has actual knowledge or reason to believe that the opinion is based on fraudulent, misleading, or otherwise incorrect information, the employee's reliance on the opinion will not be deemed to be in good faith.

(d) *Revision of an ethics opinion.* Nothing in this section prohibits an agency ethics official from revising an ethics opinion on a prospective basis where he determines that the ethics opinion previously issued is incorrect, either as a matter of law or because it is based on erroneous information.

[56 FR 1723, Jan. 17, 1991, as amended at 63 FR 43068, Aug. 12, 1998; 72 FR 16987, Apr. 6, 2007]

#### **§ 2636.104 Civil, disciplinary and other action.**

(a) *Civil action.* Except when the employee engages in conduct in good faith reliance upon an advisory opinion issued under § 2636.103 of this subpart,

an employee who engages in any conduct in violation of the prohibitions, limitations and restrictions contained in this part may be subject to civil action under 5 U.S.C. app. 504(a) and a civil monetary penalty of not more than \$10,000 for any such violation occurring before September 29, 1999, as adjusted effective September 29, 1999 to \$11,000 for any such violation occurring on or after that date, in accordance with the inflation adjustment procedures prescribed in the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, or the amount of the compensation the individual received for the prohibited conduct, whichever is greater.

(b) *Disciplinary and corrective action.* An agency may initiate disciplinary or corrective action against an employee who violates any provision of this part, which may be in addition to any civil penalty prescribed by law. When an employee engages in conduct in good faith reliance upon an advisory opinion issued under § 2636.103 of this subpart, an agency may not initiate disciplinary or corrective action for violation of this part. Disciplinary action includes reprimand, suspension, demotion and removal. Corrective action includes any action necessary to remedy a past violation or prevent a continuing violation of this part, including but not limited to restitution or termination of an activity. It is the responsibility of the employing agency to initiate disciplinary or corrective action in appropriate cases. However, the Director of the Office of Government Ethics may order corrective action or recommend disciplinary action under the procedures at part 2638 of this subchapter. The imposition of disciplinary action is at the discretion of the employing agency.

[56 FR 1723, Jan. 17, 1991, as amended at 63 FR 43068, Aug. 12, 1998; 64 FR 47097, Aug. 30, 1999]

#### **Subpart B [Reserved]**

**Subpart C—Outside Earned Income Limitation and Employment and Affiliation Restrictions Applicable to Certain Noncareer Employees**

**§ 2636.301 General standards.**

A covered noncareer employee shall not:

- (a) Receive outside earned income in excess of the 15 percent limitation described in § 2636.304 of this subpart;
- (b) Receive compensation or allow the use of his name in violation of the restrictions relating to professions involving a fiduciary relationship described in § 2636.305 of this subpart;
- (c) Receive compensation for serving as an officer or board member in violation of the restriction described in § 2636.306 of this subpart; or
- (d) Receive compensation for teaching without having first obtained advance authorization as required by § 2636.307 of this subpart.

**§ 2636.302 Relationship to other laws and regulations.**

The limitations and restrictions contained in this section are in addition to any limitations and restrictions imposed upon an employee by applicable standards of conduct or by reason of any statute or regulation relating to conflicts of interest. Even though conduct or the receipt of compensation is not prohibited by this subpart, an employee should accept compensation or engage in the activity for which compensation is offered only after determining that it is otherwise permissible. In particular, a covered noncareer employee should accept compensation only after determining that its receipt does not violate section 102 of Executive Order 12674, as amended, which prohibits a covered noncareer employee who is also a Presidential appointee to a full-time noncareer position from receiving *any* outside earned income for outside employment or for any other activity performed during that Presidential appointment.

[56 FR 1723, Jan. 17, 1991, as amended at 63 FR 43069, Aug. 12, 1998]

**§ 2636.303 Definitions.**

For purposes of this section:

(a) *Covered noncareer employee* means an employee, other than a Special Government employee as defined in 18 U.S.C. 202, who occupies a position classified above GS-15 of the General Schedule or, in the case of positions not under the General Schedule, for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule, and who is:

(1) Appointed by the President to a position described in the Executive Schedule, 5 U.S.C. 5312 through 5317, or to a position that, by statute or as a matter of practice, is filled by Presidential appointment, other than:

(i) A position within the uniformed services; or

(ii) A position within the foreign service below the level of Assistant Secretary or Chief of Mission;

(2) A noncareer member of the Senior Executive Service or of another SES-type system, such as the Senior Foreign Service;

(3) Appointed to a Schedule C position or to a position under an agency-specific statute that establishes appointment criteria essentially the same as those set forth in § 213.3301 of this title for Schedule C positions; or

(4) Appointed to a noncareer executive assignment position or to a position under an agency-specific statute that establishes appointment criteria essentially the same as those for noncareer executive assignment positions. For purposes of applying this definition to an individual who holds a General Schedule or other position that provides several rates of pay or steps per grade, his rate of basic pay shall be the rate of pay for the lowest step of the grade at which he is employed.

*Example 1.* A Schedule C appointee to a position with the United States Information Agency who holds a GS-15 position and who is compensated at the rate for GS-15, Step 9 is not a covered noncareer employee even though the pay he receives in a calendar year exceeds the annual pay for a position above GS-15. Notwithstanding that he is compensated at Step 9, the basic rate of pay for the GS-15 position he holds is the rate in effect for GS-15, Step 1 of the General Schedule, which is lower than the rate for a position above GS-15.

*Example 2.* An employee of the Environmental Protection Agency who has been a

## Office of Government Ethics

## § 2636.303

career GS-15 employee for 10 years and who is offered a non-career SES position with the Federal Aviation Administration will, if he accepts the offer, become a covered non-career employee by reason of that appointment, regardless of his former status.

*Example 3.* A Department of Justice employee who holds a Schedule A appointment is not a covered noncareer employee even though he does not have competitive status within the meaning of § 212.301 of this title.

(b) *Outside earned income and compensation* both mean wages, salaries, honoraria, commissions, professional fees and any other form of compensation for services other than salary, benefits and allowances paid by the United States Government. Neither term includes:

(1) Items that may be accepted under applicable standards of conduct gift regulations if they were offered by a prohibited source;

(2) Income attributable to service with the military reserves or national guard;

(3) Income from pensions and other continuing benefits attributable to previous employment or services;

(4) Income from investment activities where the individual's services are not a material factor in the production of income;

(5) Copyright royalties, fees, and their functional equivalent, from the use or sale of copyright, patent and similar forms of intellectual property rights, when received from established users or purchasers of those rights;

(6) Actual and necessary expenses incurred by the employee in connection with an outside activity. Where such expenses are paid or reimbursed by another person, the amount of any such payment shall not be counted as compensation or outside earned income. Where such expenses are not paid or reimbursed, the amount of compensation or earned income shall be determined by subtracting the actual and necessary expenses incurred by the employee from any payment received for the activity; or

(7) Compensation for:

(i) Services rendered prior to January 1, 1991, or prior to becoming a covered noncareer employee;

(ii) Services rendered in satisfaction of a covered noncareer employee's obli-

gation under a contract entered into prior to January 1, 1991; or

(iii) Services which the covered non-career employee first undertook to provide prior to January 1, 1991, where the standards of the applicable profession require the employee to complete the case or other undertaking.

*Example 1.* A covered noncareer employee is a limited partner in a partnership that invests in commercial real estate. Because he does not take an active role in the management of the partnership, his share of the partnership income is neither "outside earned income" nor "compensation."

*Example 2.* A covered noncareer employee of the Civil Rights Commission serves without compensation as a member of the Board of Visitors for a university. The roundtrip airfare and hotel expenses paid by the university to permit him to attend quarterly meetings of the Board are neither "outside earned income" or "compensation."

*Example 3.* Where a covered noncareer employee pays for transcripts of a hearing in which he is providing pro bono legal representation, reimbursements for those expenses by a legal aid organization are neither "outside earned income" nor "compensation."

*Example 4.* During the term of his appointment, a Deputy Assistant Secretary of Labor enters into a contract to write a book of fictional short stories. Royalties based on actual sales of the book after publication are investment income attributable to the property interest he retains in the book and, as such, are neither "outside earned income" nor "compensation."

(c) *Receive* means that the employee has the right to exercise dominion and control over the compensation or outside earned income and direct its subsequent use. Compensation or outside earned income is received by an employee if it is for his conduct and:

(1) If it is paid to any other person on the basis of designation, recommendation or other specification by the employee; or

(2) If, with the employee's knowledge and acquiescence, it is paid to his parent, sibling, spouse, child or dependent relative.

Compensation that is prohibited by § 2636.305 through § 2636.307 of this subpart is received while an individual is an employee if it is for conduct by him that occurs while an employee, even though actual payment may be deferred until after Federal employment

## § 2636.304

has terminated. Also, compensation or outside earned income donated to a charitable organization is received by the employee.

[56 FR 1723, Jan. 17, 1991, as amended at 63 FR 43069, Aug. 12, 1998; 64 FR 2422, Jan. 14, 1999; 72 FR 16987, Apr. 6, 2007]

### § 2636.304 The 15 percent limitation on outside earned income.

(a) *Limitation applicable to individuals who are covered noncareer employees on January 1 of any calendar year.* A covered noncareer employee may not, in any calendar year, receive outside earned income attributable to that calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under 5 U.S.C. 5313, as in effect on January 1 of such calendar year. The effective date of a change in the rate for level II of the Executive Schedule shall be the date on which a new rate of basic pay for level II first becomes applicable to any level II position.

NOTE: Notwithstanding the 15 percent limitation described in this section, a covered noncareer employee who is a Presidential appointee to a full-time noncareer position is prohibited by section 102 of Executive Order 12674, as amended, from receiving *any* outside earned income for outside employment or any other activity performed during that Presidential appointment.

*Example 1.* Notwithstanding that the compensation he will receive would not exceed 15 percent of the rate for level II of the Executive Schedule, a covered noncareer employee of the Department of Energy may not receive any compensation for teaching a university course unless he first receives the authorization required by § 2636.307 of this subpart.

(b) *Limitation applicable to individuals who become covered noncareer employees after January 1 of any calendar year.* The outside earned income limitation that applies to an individual who becomes a covered noncareer employee during a calendar year shall be determined on a pro rata basis. His outside earned income while so employed in that calendar year shall not exceed 15 percent of the annual rate of basic pay for level II of the Executive Schedule in effect on January 1 of the calendar year divided by 365 and multiplied by the number of days during that calendar

## 5 CFR Ch. XVI (1–1–16 Edition)

year that he holds the covered noncareer position.

*Example 1.* A former college professor received an appointment to a noncareer Senior Executive Service position on November 1, 1991. The rate of basic pay in effect for Executive Level II on January 1, 1991 was \$125,100. For the 61 day period from November 1, 1991 through December 31, 1991, the amount of outside income he may earn is limited to \$3,129. That amount is determined as follows:

Step 1. The rate of basic pay for Executive Level II as in effect on January 1 of that year (\$125,100) is divided by 365. That quotient is \$342;

Step 2. The dollar amount determined by Step 1 (\$342) is then multiplied by the 61 days the employee held the covered noncareer position. That product is \$20,862;

Step 3. The dollar amount determined by Step 2 (\$20,862) is multiplied by .15 or 15 percent. The product (\$3,129) is the maximum outside earned income the employee may have in the particular year attributable to the period of his service in a covered noncareer position.

(c) *Computation principle.* For purposes of any computation required by this section, any amount of \$.50 or more shall be rounded up to the next full dollar and any amount less than \$.50 shall be rounded down to the next full dollar.

(d) *Year to which outside earned income is attributable.* Regardless of when it is paid, outside earned income is attributable to the calendar year in which the services for which it is paid were provided.

### § 2636.305 Compensation and other restrictions relating to professions involving a fiduciary relationship.

(a) *Applicable restrictions.* A covered noncareer employee shall not:

(1) Receive compensation for:

(i) Practicing a profession which involves a fiduciary relationship; or

(ii) Affiliating with or being employed to perform professional duties by a firm, partnership, association, corporation, or other entity which provides professional services involving a fiduciary relationship; or

(2) Permit his name to be used by any firm, partnership, association, corporation, or other entity which provides professional services involving a fiduciary relationship.

*Example 1.* A covered noncareer employee of the White House Office who is an attorney

may not receive compensation for drafting a will for her friend. She may, however, participate in her bar association's pro bono program by providing free legal services for the elderly, provided her participation in the program is otherwise proper. For example, 18 U.S.C. 205 would prohibit her from representing her pro bono client in a hearing before the Social Security Administration.

*Example 2.* An accountant named C.B. Debit who is offered a covered noncareer appointment must terminate his partnership in the accounting firm of Delight, Waterhose and Debit upon appointment. Because his deceased father, J.R. Debit, was the founding partner for whom the firm is named, the name Debit need not be deleted from the firm's name. However, the name C.B. Debit may not appear on the firm's letterhead after the individual enters on duty as a covered noncareer employee.

(b) *Definitions.* For purposes of this section:

(1) *Profession* means a calling requiring specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in the scientific, historical or scholarly principles underlying such skills and methods. It is characteristic of a profession that those in the profession, through force of organization or concerted opinion, establish and maintain high standards of achievement and conduct, and commit its practitioners to continued study of the field. Consulting and advising with respect to subject matter that is generally regarded as the province of practitioners of a profession shall be considered a profession.

(2) *Profession which involves a fiduciary relationship* means a profession in which the nature of the services provided causes the recipient of those services to place a substantial degree of trust and confidence in the integrity, fidelity and specialized knowledge of the practitioner. Such professions are not limited to those whose practitioners are legally defined as fiduciaries and include practitioners in such areas as law, insurance, medicine, architecture, financial services and accounting. A covered noncareer employee who is uncertain whether a particular field of endeavor is a profession which involves a fiduciary relationship may request an advisory opinion under §2636.103.

*Example 1.* In view of the standards of the profession which require a licensed real estate broker to act in the best interests of his clients, the selling of real estate by a licensed broker involves the practice of a profession involving a fiduciary relationship.

*Example 2.* A covered noncareer employee may receive the customary fee for serving as the executor of his mother's estate, provided he does not violate the applicable limitation on the amount of outside earned income he may receive. Although the executor of an estate has fiduciary obligations, serving as an executor in these circumstances does not involve the practice of a profession and, therefore, is not prohibited. He could not, however, serve for compensation as attorney for the estate.

[56 FR 1723, Jan. 17, 1991, as amended at 58 FR 69176, Dec. 30, 1993]

#### **§2636.306 Compensation restriction applicable to service as an officer or member of a board.**

(a) *Applicable restriction.* A covered noncareer employee shall not receive compensation for serving as an officer or member of the board of any association, corporation or other entity. Nothing in this section prohibits uncompensated service with any entity.

(b) *Definition.* For purposes of this section, the phrase "association, corporation or other entity" is not limited to for-profit entities, but includes non-profit entities, such as charitable organizations and professional associations, as well as any unit of state or local government.

*Example 1.* A covered noncareer employee of the Environmental Protection Agency may not serve with compensation on the board of directors of his sister's closely-held computer software corporation.

*Example 2.* A covered noncareer employee of the Department of the Navy may serve without compensation as an officer of a charitable organization that operates a hospice.

*Example 3.* A covered noncareer employee of the Coast Guard appointed to serve as a member of the board of education of the county in which she is a resident may not receive compensation for that service.

#### **§2636.307 Requirement for advance authorization to engage in teaching for compensation.**

(a) *Authorization requirement.* A covered noncareer employee may receive compensation for teaching only when specifically authorized in advance by the designated agency ethics official.

(b) *Definition.* For purposes of this section “teaching” means any activity that involves oral presentation or personal interaction, the primary function of which is to instruct or otherwise impart knowledge or skill. It is not limited to teaching that occurs in a formal setting, such as a classroom, but extends to instruction on an individual basis or in an informal setting.

(c) *Request for authorization.* An employee may request authorization to engage in compensated teaching activities by forwarding a written request to the designated agency ethics official. The request shall describe the employee’s official duties, the subject matter of the teaching activity, the entity sponsoring the course, and the student, class or audience to be taught. In addition, it shall set forth the terms of the compensation arrangement and identify the source of the payment. The request shall be accompanied by any contract or employment agreement and any literature describing, publicizing or otherwise promoting the class, classes or course.

(d) *Standard for authorization.* Compensated teaching may be approved by the designated agency ethics official only when:

(1) The teaching will not interfere with the performance of the employee’s official duties or give rise to an appearance that the teaching opportunity was extended to the employee principally because of his official position;

(2) The employee’s receipt of compensation does not violate any of the limitations and prohibitions on honoraria, compensation or outside earned income contained in this part; and

(3) Neither the teaching activity nor the employee’s receipt of compensation therefor will violate applicable standards of conduct or any statute or regulation related to conflicts of interests.

(e) *Determination and authorization.* The determination by the designated agency ethics official to grant or deny authorization to engage in teaching for compensation shall be in writing and shall be final. The authority of the designated agency ethics official to authorize compensated teaching may not be delegated to any person other than the alternate designated agency ethics official described in § 2638.202(b).

## PART 2638—OFFICE OF GOVERNMENT ETHICS AND EXECUTIVE AGENCY ETHICS PROGRAM RESPONSIBILITIES

### Subpart A—General Provisions

#### Sec.

- 2638.101 Authority and purpose.
- 2638.102 General policies.
- 2638.103 Agency regulations.
- 2638.104 Definitions.

### Subpart B—Designated Agency Ethics Official

- 2638.201 In general.
- 2638.202 Responsibility of agency head.
- 2638.203 Duties of designated agency ethics official.
- 2638.204 Deputy ethics official.

### Subpart C—Formal Advisory Opinion Service

- 2638.301 In general.
- 2638.302 Who may request a formal advisory opinion.
- 2638.303 Subject matter of formal advisory opinions.
- 2638.304 Form of requests for formal advisory opinions.
- 2638.305 Acceptance of requests for formal advisory opinions.
- 2638.306 Notice of requests.
- 2638.307 Written comment on requests.
- 2638.308 Issuance.
- 2638.309 Reliance on formal advisory opinions.
- 2638.310 Public availability and publication of formal advisory opinions.
- 2638.311 Copies of published formal advisory opinions.
- 2638.312 Referral of requests.
- 2638.313 Agency opinions.

### Subpart D—Correction of Executive Branch Agency Ethics Programs

- 2638.401 In general.
- 2638.402 Corrective orders.
- 2638.403 Agency compliance.
- 2638.404 Report of noncompliance.

### Subpart E—Corrective and Remedial Action in Cases Involving Individual Executive Agency Employees

- 2638.501 In general.
- 2638.502 Recommendations and advice.
- 2638.503 Agency investigations.
- 2638.504 Director’s finding.
- 2638.505 Director’s decision and order.
- 2638.506 Director’s recommendation.



## Office of Government Ethics

## § 2638.104

### Subpart F—Executive Branch Agency Reports

- 2638.601 In general.
- 2638.602 Annual agency reports.
- 2638.603 Reports of referral for possible prosecution.

### Subpart G—Executive Agency Ethics Training Programs

- 2638.701 Overview.
- 2638.702 Definitions.
- 2638.703 Initial agency ethics orientation for all employees.
- 2638.704 Annual ethics training for public filers.
- 2638.705 Annual ethics training for other employees.
- 2638.706 Agency's written plan for annual ethics training.

AUTHORITY: 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

SOURCE: 46 FR 2583, Jan. 9, 1981, unless otherwise noted. Redesignated at 54 FR 50231, Dec. 5, 1989.

### Subpart A—General Provisions

#### § 2638.101 Authority and purpose.

(a) *Authority.* The regulations of this part are issued pursuant to the authority of titles I and IV of the Ethics in Government Act of 1978 (Pub. L. 95-521, as amended) (“the Act”).

(b) *Purpose.* These executive branch regulations supplement and implement titles I, IV and V of the Act, set forth more specifically certain procedures provided in those titles, and furnish examples, where appropriate.

(c) *Agency authority.* Subject only to the authority of the Office of Government Ethics as the supervising ethics office for the executive branch, all authority conferred on agencies in this subchapter B of chapter XVI of title 5 of the Code of Federal Regulations is sole and exclusive authority.

[46 FR 2583, Jan. 9, 1981. Redesignated at 54 FR 50231, Dec. 5, 1989, as amended at 65 FR 69657, Nov. 20, 2000; 72 FR 56242, Oct. 3, 2007]

#### § 2638.102 General policies.

(a) The Office of Government Ethics (“the Office”) provides overall direction and leadership concerning executive branch policies related to preventing conflicts of interest. The head

of each agency has primary responsibility for the administration of the “ethics in government” program within his or her agency. The Office carries out its leadership role by:

(1) Providing information on and promoting ethical standards in executive agencies;

(2) Consulting with agencies regarding their agency ethics programs and assisting them in interpreting ethics rules and regulations;

(3) Developing rules and regulations pertaining to conflicts of interests and standards of conduct;

(4) Monitoring compliance with the public and confidential financial disclosure requirements;

(5) Establishing a formal advisory opinion service; and

(6) Evaluating the effectiveness of programs designed to prevent conflicts of interests.

#### § 2638.103 Agency regulations.

Each agency may, subject to the prior approval of the Office of Government Ethics, issue regulations not inconsistent with this part.

#### § 2638.104 Definitions.

For the purposes of this part:

*Act* means the Ethics in Government Act of 1978 (Pub. L. 95-521, as amended).

*Agency* means any executive department, military department, Government corporation, independent establishment or agency, including the United States Postal Service and Postal Rate Commission.

*Designated agency ethics official* means an officer or employee who is designated by the head of the agency to coordinate and manage the agency's ethics program in accordance with the provisions of § 2638.203 of this part.

*Director* means the Director of the Office of Government Ethics.

*Executive branch* includes each executive agency as defined in 5 U.S.C. 105 and any other entity or administrative unit in the executive branch. However, it does not include any agency, entity, office or commission that is defined by or referred to in 5 U.S.C. app. 109(8)–(11) of the Act as within the judicial or legislative branch.

## § 2638.201

*Person* includes an individual, partnership, corporation, association, government agency, or public or private organization.

[46 FR 2583, Jan. 9, 1981. Redesignated at 54 FR 50231, Dec. 5, 1989, as amended at 65 FR 69657, Nov. 20, 2000]

### Subpart B—Designated Agency Ethics Official

#### § 2638.201 In general.

Each agency shall have a designated agency ethics official who is the officer or employee designated by the head of the agency to administer the provisions of title I of the Act within that agency, to coordinate and manage the agency's ethics program and to provide liaison to the Office of Government Ethics with regard to all aspects of such ethics program. The agency's ethics program shall be designed to implement titles I, IV and V of the Act and regulations promulgated thereunder, Executive Order 12674 as modified (relating to principles of ethical conduct for officers and employees within the executive branch) and regulations promulgated thereunder, and other statutes and regulations applicable to agency ethics matters.

[46 FR 2583, Jan. 9, 1981. Redesignated at 54 FR 50231, Dec. 5, 1989, as amended at 65 FR 69657, Nov. 20, 2000]

#### § 2638.202 Responsibilities of agency head.

(a) *In general.* The head of each agency is responsible for and shall exercise personal leadership in establishing, maintaining, and carrying out the agency's ethics program. He or she shall make available to the ethics program sufficient resources (including investigative, audit, legal, and administrative staff as necessary) to enable the agency to administer its program in a positive and effective manner.

(b) *Selection of a designated agency ethics official.* The head of each agency shall appoint an individual to serve as the designated agency ethics official and an individual to serve in an acting capacity in the absence of the primary designated agency ethics official (alternate agency ethics official). In selecting these two individuals the head of

## 5 CFR Ch. XVI (1–1–16 Edition)

an agency should ensure that the experience of such appointees in administrative, legal, managerial, or analytical work demonstrates the ability to—

(1) Review the financial disclosure reports submitted by officers or employees within the agency, assessing the application of conflict of interest laws and regulations to the information reported and counseling those officers or employees with regard to resolving actual or potential conflicts of interests, or appearances thereof;

(2) Review the financial disclosure reports submitted by Presidential appointees for confirmation purposes and counsel those appointees with regard to resolving potential conflicts of interest, or appearances thereof, before the confirmation hearing;

(3) Counsel agency personnel concerning ethics standards and programs;

(4) Counsel departing and former agency officials on post-employment conflict of interest standards;

(5) Assist managers and supervisors in understanding and implementing agency ethics programs;

(6) Administer a system for periodic evaluation of the ethics program; and

(7) Select deputy ethics officials if necessary and manage the ethics program through them.

(c) *Designation.* The head of each agency shall formally delegate functional authority to coordinate and manage the ethics program as set forth in § 2638.203 to the designated and alternate agency ethics officials. Within 30 days of any such delegation of authority the head of the agency shall submit to the Office of Government Ethics a formal written designation. The designation shall include:

(1) The names of the individuals so designated;

(2) The title of the position held by each designee; and

(3) A copy of the delegation of authority.

#### § 2638.203 Duties of the designated agency ethics official.

(a) *In general.* The designated agency ethics official shall coordinate and manage the agency's ethics program. The program consists generally of:

(1) Liaison with the Office of Government Ethics;

## Office of Government Ethics

## § 2638.203

(2) Review of financial disclosure reports;

(3) Initiation and maintenance of ethics education and training programs; and

(4) Monitoring administrative actions and sanctions.

(b) *Program elements.* In carrying out this program on behalf of the head of the agency, the designated agency ethics official shall ensure that:

(1) Close liaison with the Office of Government Ethics concerning the agency's ethics program is developed and maintained;

(2) An effective system and procedure for the collection, filing, review, and, when applicable, public inspection of the financial disclosure reports as required by title II of the Act, Executive Order 11222, and other applicable statutes and regulations is developed and properly administered;

(3) The financial disclosure reports of Presidential nominees to agency positions submitted prior to Senate confirmation hearings pursuant to § 2634.605(c) of part 2634 are certified personally by him or herself or alternate designated agency ethics official in his or her absence;

(4) All financial disclosure reports submitted by employees and filed in bureaus and regional offices, as well as those submitted and filed at the agency's headquarters, are properly maintained and effectively and consistently reviewed for conformance with all applicable laws and statutes;

(5) A list of those circumstances or situations which have resulted or may result in noncompliance with ethics laws and regulations is developed, maintained and published within the agency as required by § 206(b)(7) of the Act and made available for public inspection;

(6) An education program for agency employees concerning all ethics and standards of conduct matters is developed and conducted in accordance with subpart G, Executive Agency Ethics Training Programs, of this part.

(7) A counseling program for agency employees concerning all ethics and standards of conduct matters including post employment matters, is developed and conducted;

(8) Records are kept, when appropriate, on advice rendered;

(9) Prompt and effective action including administrative action is undertaken to remedy:

(i) Violations or potential violations, or appearances thereof, of the agency's standards of conduct including post employment regulations;

(ii) The failure to file a financial disclosure report or portions thereof;

(iii) Potential or actual conflicts of interests, or appearances thereof, which were disclosed on a financial disclosure report; and

(iv) Potential or actual violations of other laws governing the conduct or financial holdings of officers or employees of that agency, and

that a follow-up is made to ensure that actions ordered, including divestiture and disqualification, have been taken;

(10) The agency's standards of conduct regulations, financial disclosure systems, and post-employment enforcement systems are evaluated periodically to determine their adequacy and effectiveness in relation to current agency responsibilities;

(11) Information developed by internal audit and review staff, the Office of the Inspector General, if any, or other audit groups is reviewed to determine whether such information discloses a need for revising agency standards of conduct or for taking prompt corrective action to remedy actual or potential conflict of interest situations;

(12) The services of the agency's Office of the Inspector General, if any, are utilized when appropriate, including the referral of matters to and acceptance of matters from that Office;

(13) A list of those persons to whom delegations of authority are made pursuant to § 2638.204(a) is maintained and made available to the Office of Government Ethics, upon request; and

(14) Information required by the Act or requested by the Office of Government Ethics in the performance of its responsibilities is provided in a complete and timely manner.

[46 FR 2583, Jan. 9, 1981. Redesignated at 54 FR 50231, Dec. 5, 1989, and amended at 58 FR 69176, Dec. 30, 1993; 59 FR 12148, Mar. 16, 1994]

## § 2638.204

## 5 CFR Ch. XVI (1–1–16 Edition)

### § 2638.204 Deputy ethics official.

(a) *Functions.* A designated agency ethics official may, if necessary, delegate to one or more deputy ethics officials any of the duties referred to in § 2638.203, except for those functions set forth in § 2634.605(c)(2) of part 2634 and referred to in § 2638.203(b)(3) (certification of nominee statements). A deputy ethics official shall work under the supervision of the designated agency ethics official in carrying out such delegated functions.

(b) *Dual status.* A deputy ethics official may also be designated pursuant to § 2638.202 to serve as the alternate agency ethics official. During the absence of the designated agency ethics official a deputy ethics official who has also been designated as the alternate ethics official shall perform the functions set forth in § 2634.605(c)(2) of part 2634 and referred to in § 2638.203(b)(3).

[46 FR 2583, Jan. 9, 1981. Redesignated at 54 FR 50231, Dec. 5, 1989, and amended at 58 FR 69176, Dec. 30, 1993]

## Subpart C—Formal Advisory Opinion Service

### § 2638.301 In general.

(a) The Director of the Office of Government Ethics has the authority and responsibility to render formal advisory opinions pursuant to Section 402(b)(8) of the Act. This service is available to any person who has a question about a matter over which the Office of Government Ethics has jurisdiction. Formal advisory opinions will be issued when a two-pronged test is met. First, the person making the request must meet the requirements of § 2638.302 and, second, the subject matter of the request must meet the criteria set forth in § 2638.303.

(b) Normally, formal advisory opinions will not be issued to individuals who wish to obtain general advice concerning their own specific present or proposed activities or financial transactions. Such questions should be directed to the designated ethics official of the agency in which the individual will serve, serves or served. If a designated agency ethics official receives a request which he or she believes should be answered by the Office of

Government Ethics, a referral procedure is available.

(c) The Office of Government Ethics will provide interested parties, to the extent practicable, with an opportunity to comment on any question which will be the subject of a formal advisory opinion issued by the Office. These opinions will be published in a form which will not identify specific individuals unless necessary to the understanding of the opinion. Copies will be sent to the designated ethics officials of each agency and be available at the Office of Government Ethics in that same form.

### § 2638.302 Who may request a formal advisory opinion.

Any person (as defined in § 2638.104) may request an opinion with respect to a situation in which that person is directly involved. A designated agency ethics official, representative, or attorney may request an opinion on behalf of the person. Notwithstanding this direct involvement requirement, a designated agency ethics official may always request an opinion concerning a situation about which he or she has knowledge.

### § 2638.303 Subject matter of formal advisory opinions.

Formal advisory opinions will be rendered on matters of general applicability or on important matters of first impression concerning the application of the Act, Executive Order 11222 and regulations promulgated pursuant to such Act and Executive Order, and the laws embodied in 18 U.S.C. 202–209. The Director will respond to those requests which in his or her discretion fall within this category taking into consideration:

(a) The unique nature of the question and its precedential value,

(b) The potential number of officers or employees throughout the Government affected by the question,

(c) The frequency with which the question arises, and

(d) The likelihood or presence of inconsistent interpretations on the same question by different agencies.

Except in unusual circumstances, opinions will not be rendered with respect

## Office of Government Ethics

## § 2638.307

to hypothetical situations posed in requests. Opinions may be rendered, however, on proposed activities or transactions.

### § 2638.304 Form of requests for formal advisory opinions.

(a) A request for a formal advisory opinion should be directed to the Director of the Office of Government Ethics, Suite 500, 1201 New York Avenue NW., Washington, DC 20005-3917.

(b)(1) A request should be in writing and signed by the individual making the request or by a representative of that person. A request shall state all material facts necessary for the Director to render a complete and correct opinion.

(2) In addition, it should also include the following information:

(i) the name, mailing address, and daytime telephone contact of the individual making the request, and

(ii) a copy of the position, description of the position involved, if available.

(c) If the request is submitted by a representative, he or she must show his or her representative status, list a mailing address and daytime telephone contact.

[46 FR 2583, Jan. 9, 1981. Redesignated at 54 FR 50231, Dec. 5, 1989, and amended at 55 FR 27180, July 2, 1990]

### § 2638.305 Acceptance of requests for formal advisory opinions.

(a) Subject to the provisions of paragraph (d) of this section, the Director shall review each request for a formal advisory opinion and take one of the following actions:

(1) If the Director determines that the person making the request meets the requirements of § 2638.302 and that the subject matter of the request qualifies under the criteria established in § 2638.303, he or she shall assign an identifying number to the request and notify the person that a formal advisory opinion will be rendered; or

(2) If the Director determines that the person making the request is not a person who is eligible to receive a formal advisory opinion as provided in § 2638.302, or that the subject of the request is not a matter upon which the Office issues formal advisory opinions as outlined by § 2638.303, he or she shall

so notify the person making the request.

When a formal advisory opinion will not be rendered, the Office of Government Ethics may provide other informational assistance to the person as appropriate. (See also § 2638.312.)

(b) If at any time after receipt of a request for a formal advisory opinion, the Director believes that additional relevant information is needed, he or she may seek such information directly from the person requesting the opinion or from other sources which may include the agency involved.

(c) The person requesting the opinion may furnish the Office of Government Ethics with legal memoranda or other material relevant to the opinion requested.

(d)(1) In the case of a request which involves an actual or apparent violation of any conflict of interest law embodied in 18 U.S.C. 202-209, the Director shall consult with the Criminal Division of the Department of Justice.

(2) If after such consultation the Criminal Division determines that a criminal investigation will be undertaken, the Director shall take no further action with regard to that request pending a determination by the Criminal Division not to prosecute.

(3) Upon receipt of a determination by the Criminal Division not to prosecute, the Director shall then follow the procedures for all other requests for formal advisory opinions set forth in this part.

### § 2638.306 Notice of requests.

The Director shall provide notice to interested parties identified in a request which will be the subject of a formal advisory opinion that such an opinion will be rendered. Generally, the designated agency ethics official of the agency involved shall be notified of the request.

### § 2638.307 Written comment on requests.

(a) To the extent practicable, the Director shall provide interested parties with an opportunity to submit written comment on a request for a formal advisory opinion. A time by which the

## § 2638.308

comment should be received to be considered will be indicated with the notice that the request has been made.

(b) Additional time in which to comment may be granted upon written request to or at the discretion of the Director. Such requests and all written comments shall be sent to the Office of Government Ethics, Suite 500, 1201 New York Avenue NW., Washington, DC 20005-3917.

[46 FR 2583, Jan. 9, 1981. Redesignated at 54 FR 50231, Dec. 5, 1989, and amended at 55 FR 27180, July 2, 1990]

### § 2638.308 Issuance.

(a) A formal advisory opinion,

(1) Which involves the application of any conflict of interest law embodied in 18 U.S.C. 202-209 to a transaction or activity which does not raise a question of an actual or apparent violation of this law but which raises an important matter of first impression, or

(2) Which is issued following the procedure set forth in § 2638.305(d),

requires consultation by the Office of Government Ethics with the Office of Legal Counsel of the Department of Justice before it is issued.

(b) An advisory opinion shall be considered issued when it is dated, numbered, and signed by the Director. Unless released by the person who made the request, the opinion will not become publicly available until information which identifies individuals involved and which is unnecessary to the complete understanding of the opinion has been deleted from the opinion and this version of the opinion is placed in a public reading file at the Office of Government Ethics. (See § 2638.310)

### § 2638.309 Reliance on formal advisory opinions.

(a) Any formal advisory opinion referred to in § 2638.308(a) or any provisions or finding of a formal advisory opinion involving the application of the Act, Executive Order 11222 and the regulations promulgated pursuant to the Act or Executive Order, may be relied upon by:

(1) Any person directly involved in the specific transaction or activity with respect to which such advisory opinion has been rendered, and

## 5 CFR Ch. XVI (1-1-16 Edition)

(2) Any person directly involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion was rendered.

(b) Any person who relies upon any provision or finding of any formal advisory opinion in accordance with paragraph (a) of this section and who acts in good faith in accordance with the provisions and findings of such opinion, shall not, as a result of such act, be subject to prosecution under 18 U.S.C. 202-209 or, in the case where the opinion is exculpatory, be subject to any administrative adverse action or civil action based upon legal authority cited in that opinion.

### § 2638.310 Public availability and publication of formal advisory opinions.

(a) The Director shall make sufficient deletions in any formal advisory opinion so that unless necessary to the complete understanding of the opinion, the identity of any person involved is not disclosed. No deletion shall in any way affect the substance of the opinion.

(b) A copy of this version of the opinion shall then be made available for public inspection within 10 working days after the issuance of the opinion at the Office of Government Ethics, Suite 500, 1201 New York Avenue NW., Washington, DC 20005-3917.

(c) The Director shall thereafter publish this version of the opinion.

[46 FR 2583, Jan. 9, 1981. Redesignated at 54 FR 50231, Dec. 5, 1989, and amended at 55 FR 27180, July 2, 1990]

### § 2638.311 Copies of published formal advisory opinions.

Each designated agency ethics official shall receive a copy of each published opinion. Copies will also be available to the public from the Office of Government Ethics upon request at no more than cost.

### § 2638.312 Referral of requests.

(a) If a designated agency ethics official receives a request for advice from a person and determines that the request may come within the criteria set

## Office of Government Ethics

## § 2638.402

forth in § 2638.303, he or she shall contact the Office of Government Ethics concerning the request before referring the request to the Office. If after such consultation the Office of Government Ethics determines that the request should be the subject of a formal advisory opinion, the designated agency ethics official shall notify the person making the request of that determination and request the person's permission to refer the request to the Office of Government Ethics.

(b) If the Director receives a request for an opinion which does not fulfill the criteria set forth in § 2638.303, he or she may:

(1) Furnish informational assistance to the person as provided in § 2638.305(a), or

(2) Refer the request to the appropriate designated agency ethics official.

(c) In all instances covered by paragraphs (a) and (b) of this section, a referral will not be made in the case of questions regarding possible future employment plans of an individual making the request unless he or she is first notified and gives his or her consent or the request itself indicates that such a referral may be made.

### § 2638.313 Agency opinions.

If the designated agency ethics official issues a written opinion concerning the application of 18 U.S.C. 202-209, he or she shall transmit a copy of that opinion to the Office of Government Ethics.

## Subpart D—Correction of Executive Branch Agency Ethics Programs

SOURCE: 55 FR 1666, Jan. 18, 1990, unless otherwise noted.

### § 2638.401 In general.

The Director of the Office of Government Ethics has authority under subsections 402(b)(9) and 402(f)(1) of the Ethics in Government Act to order action to correct deficiencies in agency ethics programs. These procedures are intended to be used to correct deficiencies in agency ethics programs that are not being addressed ade-

quately by the agency. They are not intended to be used to deal with cases involving individual employees or former employees. See subpart E of this part. For purposes of this section, an agency ethics program shall include those matters that are the responsibility of agency heads and designated agency ethics officials under subpart B of this part and shall include the requirements under part 2634 of this chapter and part 735 of this title to establish public and nonpublic financial disclosure systems. In implementing these procedures, the Director may use any authority contained in the Ethics Act.

### § 2638.402 Corrective orders.

(a) *Notice.* Where the Director has information indicating that an agency ethics program is not in full compliance with the requirements set forth in applicable statutes or regulations, the Director may issue a Notice of Deficiency to the designated agency ethics official and request an agency report under paragraph (b) of this section.

(b) *Agency report.* Within such time as may be set forth in the Notice of Deficiency, the designated agency ethics official shall provide a written report to the Director that shall include relevant information about the agency's ethics program. The ethics official's report may include:

(1) Information establishing that there is no deficiency;

(2) An explanation of how any deficiency is being corrected; or

(3) A plan for correcting any deficiency within a reasonable period of time.

(c) *Director's determination.* The Director will make a determination based on the agency report.

(1) If the Director determines that there is no deficiency, the designated agency ethics official will be so notified.

(2) If the Director determines that appropriate steps are being taken or that the agency has presented an adequate plan for correcting the deficiency, the Director will so notify the designated agency ethics official and, in consultation with the designated

#### § 2638.403

agency ethics official, establish requirements for status reports, if necessary, and for notification when the deficiency has been corrected.

(3) If the Director determines that a deficiency is not being corrected, the Director will issue an Order under paragraph (d) of this section.

(d) *Orders.* An order issued by the Director will be addressed to the head of the agency with a copy to the designated agency ethics official and shall specify:

(1) The deficiency in the agency ethics program that requires correction;

(2) The basis upon which the Director has determined that a deficiency exists;

(3) The corrective action required to remedy the deficiency; and

(4) Any reporting requirements necessary to establish that corrective action has been accomplished.

#### § 2638.403 Agency compliance.

Within such time as may be set forth in the order, the agency head shall file a report with the Director detailing the corrective action taken. If corrective action cannot be accomplished within that time, the agency head shall submit a plan of corrective action for approval by the Director providing for appropriate status reports and notification of compliance. In either case, if the agency report or plan is deemed satisfactory, the Director will so inform the agency head. If the agency report or plan is insufficient, but only in minor respects, the Director may inform the agency head of the adjustments needed to bring the report or plan into compliance and a timeframe therefor; otherwise, the procedures under § 2638.404 of this subpart will be invoked.

#### § 2638.404 Report of noncompliance.

If the agency fails to comply with an order issued under § 2638.402(d), the Director shall:

(a) Notify the head of the agency of intent to furnish a report of noncompliance to the President and the Congress;

(b) Provide the agency 14 calendar days within which to furnish written comments for submission with the report of noncompliance; and

#### 5 CFR Ch. XVI (1–1–16 Edition)

(c) Report the agency's noncompliance to the President and to the Congress.

### Subpart E—Corrective and Remedial Action in Cases Involving Individual Executive Agency Employees

SOURCE: 55 FR 1667, Jan. 18, 1990, unless otherwise noted.

#### § 2638.501 In general.

(a) *Authority.* The Director of the Office of Government Ethics has authority under subsections 402(b)(9) and 402(f)(2) of the Act to order corrective and remedial action with respect to individual employees to bring about compliance with applicable ethics provisions. Nothing in this subpart relieves an agency of its primary responsibility to ensure compliance.

(b) *Definitions.* For the purpose of this subpart:

(1) *Ethics provision* includes any rule, regulation or executive order relating to conflicts of interest or standards of conduct in the executive branch. The term excludes any statute that is contained in title 18 of the United States Code or which imposes a criminal penalty as well as any statute made applicable to a specific agency that mandates or proscribes conduct not otherwise the subject of Governmentwide standards. It excludes any matter covered by sections 101 (k) and (m) of Executive Order 12674 that are within the cognizance of agency Inspectors General, the Office of Special Counsel or the Equal Employment Opportunity Commission.

(2) *Employee* means any officer or employee, including a special Government employee, covered by any of the provisions contained in part 735 of this title.

(3) *Head of an agency*, in the case of an agency that is headed by a board, committee or other group of individuals, refers to the employee's appointing authority.

(4) *Corrective action* means any action necessary to remedy a violation of an ethics provision including, but not limited to, recusal, divestiture, termination of an activity, restitution, or



the creation of a qualified blind or diversified trust.

(5) *Disciplinary action* includes the full range of disciplinary actions provided for by Office of Personnel Management regulations and instructions implementing authorities contained in title 5 of the United States Code or provided for in comparable authorities applicable to employees not subject to title 5.

(6) The terms *he*, *his* and *him* include “she,” “hers” and “her.”

(c) *Violations of criminal statutes.* Nothing contained in this part gives the Director or any agency official authority to make a finding that any criminal statute relating to conflicts of interest is being or has been violated. If facts elicited under these procedures indicate that a criminal violation of any such provision is occurring or has occurred, the suspected violation will be referred for possible prosecution in accordance with 28 U.S.C. 535 and the reporting requirements set forth in § 2638.603 of this chapter shall apply. Subsequent to referral, proceedings under this subpart may be initiated or continued at the discretion of the Director, after consultation with the appropriate investigatory or prosecutorial authorities.

(d) *National security.* Proceedings under this subpart shall be conducted in accordance with applicable national security requirements.

[55 FR 1667, Jan. 18, 1990, as amended at 55 FR 21846, May 30, 1990]

#### § 2638.502 Recommendations and advice.

The Director may make recommendations and provide advice to agencies, designated agency ethics officials and employees for the purpose of ensuring an employee's compliance with applicable ethics provisions. This authority may be used where there is doubt or a dispute regarding the applicability of an ethics provision or where the Director has information indicating that an ethics provision is being improperly interpreted. Recommendations may be made or advice provided on the Director's own initiative or at the Director's discretion in response to a written or oral request. As determined by the Director, the rec-

ommendation may be made or the advice given either orally or in writing. In addition, the Director shall afford an employee the opportunity for personal consultation, if practicable, regarding action required to be taken by the employee to achieve compliance with applicable ethics provisions.

#### § 2638.503 Agency investigations.

(a) *Recommendation of investigation.* If the Director has reason to believe that an employee is violating or has violated any ethics provision, the Director may recommend to the head of the agency that the agency conduct such investigation as is necessary to determine whether, in fact, a violation is occurring or has occurred and, where warranted, take appropriate disciplinary or corrective action. If the matter already has been investigated or if the facts are fully known to the agency and, in the opinion of the agency head, require no further investigation, the head of the agency shall notify the Director of that determination and shall promptly file the agency report required by paragraph (c) of this section.

(1) If the employee involved is the head of an agency, the recommendation shall be made to the President and the procedures set forth in this section shall serve as guidance only.

(2) Where there is reason to believe that an employee has given preferential treatment or failed to act impartially, this authority will not be used to initiate an investigation in the nature of a review or audit of the agency program in which the employee participated.

(b) *Initiation of investigation.* The head of the agency shall notify the Director when the agency has initiated an investigation. Where it is anticipated that the investigation will not be completed within 60 calendar days, the head of the agency will notify the Director of that fact and provide an explanation reasonably justifying additional time.

(c) *Agency report.* The head of the agency shall file a report with the Director detailing findings of fact and disciplinary and/or corrective actions taken, if any.

(d) *Director's determination.* The Director will make a determination based on the agency investigation and report.

## § 2638.504

(1) If the Director determines that the agency has conducted an adequate investigation and has taken appropriate corrective and/or disciplinary action, the Director shall notify the agency that the matter is closed.

(2) If the Director determines that the agency has conducted an adequate investigation and has recommended appropriate corrective and/or disciplinary action, the Director shall notify the agency that the matter will be closed upon notification that such action has been taken.

(3) If the Director determines that the agency has not conducted an adequate investigation, the Director may recommend that the agency undertake further investigative effort.

(4) If the Director determines that the agency has improperly interpreted an ethics provision or improperly applied an ethics provision to the facts of the case, the Director may, in accordance with § 2638.502, provide advice and recommendations necessary to ensure compliance.

(5) If the Director determines that the agency has taken or recommended inappropriate corrective or disciplinary action, the Director may notify the head of the agency of intent to institute proceedings under § 2638.504 or § 2638.505.

(e) *Notice of noncompliance.* If the Director determines that the head of an agency has failed to conduct an adequate investigation within a reasonable period of time, the Director shall notify the President of that determination. A Notice of Noncompliance will not be based upon a determination that the agency has improperly interpreted or applied an ethics provision or that the agency has taken or recommended inappropriate corrective or disciplinary action.

### § 2638.504 Director's finding.

(a) *In general.* If the Director has reason to believe that an employee is violating or has violated an ethics provision, the Director may initiate proceedings under this section for the purpose of making a finding as to whether there is or has been such a violation. In the context of such proceedings, the Office of Government Ethics has the burden of proof to establish that the em-

## 5 CFR Ch. XVI (1–1–16 Edition)

ployee is violating or has violated an ethics provision. The procedures contained in this section do not apply to findings or orders for action made to obtain compliance with the financial disclosure requirements in title II of the Ethics Act. For those findings and orders, the procedures contained in section 206 of the Act shall apply.

(b) *Investigation.* The Director may initiate such investigation as is necessary to determine whether proceedings under this section are warranted. Ordinarily, a determination to proceed will be based upon an agency report of investigation filed under § 2638.503(c) and a determination by the Director under § 2638.503(d)(5) that the agency has taken or recommended inappropriate corrective or disciplinary action.

(c) *Notice.* The employee shall be served personally or by United States mail with written notice of commencement of proceedings under this section. A copy of the notice shall be provided to the head of the agency and to the designated agency ethics official. The notice shall be signed by the Director and shall include the following:

- (1) A brief statement setting forth the basis for a possible ethics violation;
- (2) A copy of this section; and
- (3) The date by which the employee's comments must be submitted.

(d) *Employee comments.* The respondent employee has the right to comment on the alleged violation of an ethics provision by submission of evidence or arguments. As determined by the Director, the submission may be made orally or in writing. In the absence of an extension granted by the Director for good cause shown, comments shall be submitted within the time set forth in the notice.

(e) *Finding.* The Director will make a written finding as to whether a violation of any ethics provision has occurred or is occurring. The finding will include a statement of the facts upon which the finding is based and a reference to the specific ethics provision in issue. A copy of the finding will be provided to the respondent employee, the head of the agency and the designated agency ethics official.

**§ 2638.505 Director's decision and order.**

(a) *In general.* Where the Director has reason to believe that an employee is violating an ethics provision, the Director may, subject to the procedures set forth in this section, issue an order that the employee take specific corrective action to remedy the violation. Ordinarily, a determination to proceed under this paragraph (a) will be based on the Director's finding under § 2638.504(e) that an ethics violation has occurred or is occurring and reason to believe that the violation is continuing. The procedures contained in this section do not apply to findings or orders for action made to obtain compliance with the financial disclosure requirements in title II of the Ethics Act. For those findings and orders, the procedures contained in section 206 of the Act shall apply.

(b) *Notice.* The employee will be served, personally or by United States mail, with notice of proceedings to determine whether a violation of an ethics provision is occurring and whether corrective action is necessary to end the violation. A copy of the notice shall be provided to the head of the employee's agency and the designated agency ethics official thereof. The notice shall specify the employee's right to present evidence or arguments either in writing or, at the employee's written request, at a hearing conducted on the record. The notice shall be signed by the Director and shall include:

(1) A brief statement setting forth the basis for a possible ethics violation;

(2) Where applicable, a copy of the Director's finding under § 2638.504(e);

(3) A statement of the authority under which proceedings are to be conducted, together with a copy of this section; and

(4) The date by which the employee must, by written notification to the Director, elect to present evidence and arguments either at a hearing or in writing.

(c) *Separation of functions.* Once the Director has issued a notice of proceedings and if the respondent employee has elected to have a hearing conducted on the record, the General Counsel of the Office of Government

Ethics shall designate attorneys of the Office of Government Ethics to participate on behalf of the Office in the proceedings, including the investigation and presentation of the evidence at the hearing. During this time period, the General Counsel of the Office of Government Ethics shall serve as Advisor to the Director and will not supervise Office of Government Ethics attorneys who are charged with the investigation and presentation of the evidence in the pending matter. A Deputy General Counsel shall supervise the Office attorneys responsible for the investigation and presentation of the evidence during this time period. No officer, employee, or agent engaged in the performance of investigative or advocacy functions for the Office of Government Ethics shall, in that or a factually related case, participate or advise in the decision, recommended decision or Office review except as witness or counsel in the proceedings. The Deputy General Counsel may request the views or report of the designated agency ethics official of the employee's agency when necessary to develop the record.

(d) *Written submissions.* Where the respondent employee elects to submit evidence and arguments in writing, he will be given a period of 30 calendar days from the date of the notice within which to make a submission.

(e) *Hearings.* If the respondent employee demands a hearing conducted on the record, he will be given written notice of the time and place of the hearing. The hearing will be convened within a reasonable period of time and will be conducted on the record. An administrative law judge who has been appointed under 5 U.S.C. 3105 shall act as the presiding official at the hearing. Hearings will be as informal as may be reasonably appropriate under all the circumstances. Evidence and testimony, although not ordinarily admissible under rules of evidence, may be received subject to the discretion of the administrative law judge. Immaterial, irrelevant or unduly repetitious evidence may be excluded. The parties may stipulate as to any facts or testimony. The testimony of witnesses shall be under oath and witnesses shall be subject to cross-examination. The administrative law judge shall make such

rulings with respect to the conduct of the hearings as circumstances may require to ensure the orderly and expeditious presentation of evidence in a manner fair to the parties and consistent with these regulations and requirements of due process of law. The following procedures will apply to the hearing:

(1) *Conference.* The respondent employee or the designated attorney for the Office of Government Ethics may request, and the administrative law judge, on his own initiative or in response to a request, may set a pre-hearing conference for such purposes as the administrative law judge deems necessary.

(2) *Public hearings.* Hearings shall generally be open to the public. However, the administrative law judge may order a hearing or any part thereof closed, on his own initiative or upon motion of a party or other affected person, where to do so would be in the best interests of national security, the respondent employee, a witness, the public or other affected persons. Unless specifically excluded by the administrative law judge, the designated agency ethics official of the employee's agency shall be permitted to attend a closed hearing. Any order closing the hearing or any part thereof shall set forth the reasons for the administrative law judge's decision. Any objections thereto shall be made a part of the record. If a party or affected person's request to close the hearing or any part thereof is denied by the administrative law judge, that request shall be immediately appealable to the Director and the hearing shall be held in abeyance pending resolution of the appeal. The notice of appeal shall be filed in writing, not to exceed 10 pages exclusive of attachments, with the Director within 3 working days of the administrative law judge's denial of the request. The Director shall provide an opportunity for an oral hearing on the appeal conducted on the record and shall decide the appeal within 3 working days following receipt of the notice of appeal.

(3) *Continuances and delays.* The authority to adjourn the hearing shall rest with the administrative law judge.

Continuances will be allowed only for the most compelling reasons.

(4) *Hearing record.* Testimony and arguments shall be recorded verbatim and preserved for a reasonable period of time. When requested, transcripts of the testimony and arguments and copies of all documentary exhibits will be made available to the respondent employee upon the payment of the reasonable costs thereof.

(5) *Representation.* A party is entitled to appear in person or by or with counsel.

(6) *Witnesses.* The administrative law judge does not have the authority to subpoena witnesses. However, the respondent employee and the Office of Government Ethics may call witnesses whose testimony is relevant and necessary to the proceedings. Witnesses who are to testify or to produce documents in their official capacities will be assigned to do so by their agencies pursuant to 5 U.S.C. 6322 and will be paid travel expenses under 5 U.S.C. 5702. Witnesses who are not Federal employees may be issued invitational travel orders under 5 U.S.C. 5703 based on a determination by the administrative law judge that their testimony is essential to the proceedings.

(7) *Proof.* The Office of Government Ethics has the burden of proof to establish that the respondent employee is committing a violation of an ethics provision and that corrective action is necessary to end the violation.

(8) *Evidence.* A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct cross-examination. The respondent employee and the designated attorney for the Office of Government Ethics may offer evidence, arguments, testimony of witnesses, affidavits or sworn statements.

(f) *Recommended decision.* At the conclusion of the hearing, the administrative law judge may request that the parties submit proposed findings and conclusions within a reasonable period of time. After receipt of the proposed findings and conclusions, if any, the administrative law judge shall certify the entire record to the Director for decision. When so certifying the record, the administrative law judge shall

## Office of Government Ethics

## § 2638.506

make a recommended decision that includes his written findings of fact and conclusions of law with respect to material issues.

(g) *Decision and order.* The Director's decision shall include written findings and conclusions with respect to all material issues and shall be supported by substantial evidence of record. The order shall state the corrective action, if any, to be taken by the respondent employee in order to remedy a violation of an ethics provision and shall establish a reasonable period of time within which the respondent employee must commence and complete the corrective action. A copy of the decision and order shall be furnished to the respondent employee and to the head of the agency and the designated agency ethics official, or where the respondent employee is the head of an agency, to the President.

(1) Preliminary to issuing a decision and order, the Director may request that comments on the recommended decision be provided by the designated agency ethics official of the employee's agency.

(2) Where the respondent employee has elected to have a hearing conducted on the record, the Director shall issue a decision and order as soon as practicable following receipt of the certified record and the administrative law judge's recommended decision.

(3) Where the respondent employee has elected to make a written submission under paragraph (d) of this section or has chosen to make no submission and has not requested a hearing, the Director will issue a decision and order as soon as practicable following receipt of all materials of record.

(4) In addition to the decision and order and any finding issued under § 2638.504(e), the record will include, where applicable, all written submission under § 2638.504(d) and § 2638.505(d), a record of the hearing, all documentary evidence introduced at the hearing, any proposed findings and conclusions submitted by the parties and the administrative law judge's recommended decision.

(h) *Compliance with the order.* The respondent employee shall comply with the Director's order by commencing and completing the corrective action

within the time specified in the order and by furnishing the Director with satisfactory evidence of compliance.

(i) *Notice of noncompliance.* Where the respondent employee fails to comply with the Director's order within the time specified in the order, the Director will provide the head of the respondent employee's agency with written notice of the respondent employee's failure to comply. Where the respondent employee is the head of the agency, the Director shall submit such notification to the President.

[55 FR 1667, Jan. 18, 1990, as amended at 55 FR 21846, May 30, 1990]

### § 2638.506 Director's recommendation.

(a) Where the Director has made a finding under § 2638.504(e) or has issued a decision and order under § 2638.505(g) that an ethics provision is being or has been violated, the Director may recommend to the head of the respondent employee's agency that appropriate disciplinary action be taken. If the respondent employee is the head of an agency, the Director shall make any such recommendation to the President and the procedures contained in this section will serve as guidance only.

(b) *Agency response.* Within the time specified by the Director in his recommendation, the head of the agency shall notify the Director in writing of the action taken. If the action cannot be accomplished within the time specified, the head of the agency shall notify the Director in writing of the time needed for the action to be taken, and, thereafter, will provide appropriate notice of the disciplinary action taken.

(c) *Notice of noncompliance.* If the Director determines that the head of an agency has not taken appropriate disciplinary action within a reasonable period of time after the Director has recommended such action, the Director may notify the President of that determination in writing.

### Subpart F—Executive Branch Agency Reports

SOURCE: 55 FR 1670, Jan. 18, 1990, unless otherwise noted.

## § 2638.601

## 5 CFR Ch. XVI (1–1–16 Edition)

### § 2638.601 In general.

Agencies are required by section 402(b)(10) of the Act to file such reports as the Director of the Office of Government Ethics deems necessary. Section 402(e) contains specific requirements for annual reports and for reporting cases referred for possible prosecution under 28 U.S.C. 535. Reporting requirements imposed under this subpart are in addition to any requirements for reports or opinions contained in part 735 of this title, parts 2633 through 2637 of this chapter, or otherwise under this chapter, and in other subparts of this part.

### § 2638.602 Annual agency reports.

(a) On or before February 1 of each year, each agency shall file with the Office of Government Ethics a report containing information about the agency's ethics program. Detailed reporting requirements will be specified in instructions to be issued by the Director in advance of the first day of the period to be covered by the annual report. Annual agency reports will cover the prior calendar year and, as a minimum, will include the following:

(1) The name, position, title and duties of each official who performs any or all of the duties of the designated agency ethics official or alternate;

(2) Statistics regarding public and nonpublic (confidential) financial disclosure report filings;

(3) A description and evaluation of the agency's program of ethics education, training and counseling, including the number of training courses given, the subject matters covered, training materials distributed and counseling services offered.

(b) Failure to timely file the report required by paragraph (a) of this section may be cause to invoke the procedures at subpart D of this part for correction of agency programs.

### § 2638.603 Reports of referral for possible prosecution.

(a) *In general.* Section 535 of title 28 of the United States Code imposes upon every agency a duty to report to the Attorney General any information, allegations or complaints relating to violations of title 18 of the United States Code involving Government officers

and employees, including possible violations of 18 U.S.C. 207 by former officers and employees. Guidelines issued by the Attorney General require reporting of such allegations or complaints to the local office of the appropriate investigative agency, the United States Attorney for the district in which the violation occurred or is occurring and the appropriate division of the Department of Justice.

(b) *Report of referral.* When any matter involving an alleged violation of Federal conflict of interest law is referred pursuant to 28 U.S.C. 535, the agency shall concurrently notify the Director of the Office of Government Ethics of the referral and provide a copy of the referral document, unless such notification or disclosure would otherwise be prohibited by law.

(c) *Disposition reports.* (1) Where there has been notice that the matter reported under paragraph (b) of this section will not be prosecuted, the agency shall promptly notify the Director of that fact, the date of the decision and any disciplinary or corrective action initiated, taken or to be taken by the agency.

(2) When the agency is notified or learns from the Department of Justice that an indictment has been handed up and signed or an information has been filed, the agency shall promptly report that fact to the Director. Thereafter, the agency shall promptly notify the Director of the final disposition of the prosecution and of any disciplinary or corrective action initiated, taken or to be taken by the agency.

(3) When disciplinary or corrective action is initiated or is to be taken, the agency will notify the Director of the final disposition of the matter.

[55 FR 1670, Jan. 18, 1990, as amended at 55 FR 21847, May 30, 1990]

## Subpart G—Executive Agency Ethics Training Programs

SOURCE: 65 FR 7279, Feb. 14, 2000, unless otherwise noted.

### § 2638.701 Overview.

Each agency must have an ethics training program to teach employees about ethics laws and rules and to tell

## Office of Government Ethics

## § 2638.704

them where to go for ethics advice. The training program must include, at least, an initial agency ethics orientation for all employees and annual ethics training for covered employees.

### § 2638.702 Definitions.

For purposes of this subpart:

*Agency supplemental standards* means those regulations published by an agency in concurrence with the Office of Government Ethics under 5 CFR 2635.105.

*Employee* includes officers of the uniformed services and special Government employees, as defined in 18 U.S.C. 202(a).

*Federal conflict of interest statutes* means 18 U.S.C. 202–203, 205, and 207–209.

*Principles* means the Principles of Ethical Conduct, Part I of Executive Order 12674, as modified by Executive Order 12731.

*Standards* means the Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR part 2635.

### § 2638.703 Initial agency ethics orientation for all employees.

Within 90 days from the time an employee begins work for an agency, the agency must do the following:

(a) *Ethics materials.* The agency must give the employee:

(1) The Standards and any agency supplemental standards to keep or review; or

(2) Summaries of the Standards, any agency supplemental standards, and the Principles to keep.

NOTE TO PARAGRAPH (a): If the agency does not give the employee the Standards and any agency supplemental standards to keep, the complete text of both must be readily available in the employee's immediate office area.

(b) *Contact persons.* The agency must give the employee the names, titles, and office addresses and telephone numbers of the designated agency ethics official and other agency officials available to advise the employee on ethics issues.

(c) *One hour to review.* The agency must give the employee at least one hour of official duty time to review the items described above. This one-hour requirement may be reduced by any amount of time the employee receives

verbal ethics training in the same 90-day period.

### § 2638.704 Annual ethics training for public filers.

(a) *Covered employees.* Each calendar year, agencies must give verbal ethics training to employees who are required by 5 CFR part 2634 to file public financial disclosure reports.

(b) *Content of training.* Agencies are encouraged to vary the content of verbal training from year to year but the training must include, at least, a review of:

(1) The Principles;

(2) The Standards;

(3) Any agency supplemental standards;

(4) The Federal conflict of interest statutes; and

(5) The names, titles, and office addresses and telephone numbers of the designated agency ethics official and other agency ethics officials available to advise the employee on ethics issues.

(c) *Length and presentation of training.* Employees must be given at least one hour of official duty time for verbal training. The training must be:

(1) Presented by a qualified instructor; or

(2) Prepared by a qualified instructor and presented by telecommunications, computer, audiotape, or videotape.

(d) *Availability of qualified instructor.* A qualified instructor must be available during and immediately after the training. Qualified instructors are:

(1) The designated agency ethics official;

(2) The alternate agency ethics official;

(3) A deputy agency ethics official;

(4) Employees of the Office of Government Ethics (OGE) designated by OGE; and

(5) Persons whom the designated agency ethics official (or his or her designee) determines are qualified to respond to ethics questions raised during the training.

*Example 1 to paragraph (d):* An agency provides annual ethics training for public filers in a regional office by establishing a video conference link between the regional office and a qualified instructor in the headquarters office. The video link provides for

## § 2638.705

## 5 CFR Ch. XVI (1–1–16 Edition)

direct and immediate communication between the qualified instructor and the employees receiving the training. Even though the qualified instructor is not physically located in the room where the training occurs, the qualified instructor is available.

*Example 2 to paragraph (d):* The agency described in the preceding example provides videotaped training instead of training through a video conference link. The employees viewing the videotape are provided with a telephone at the training site and the telephone number of a qualified instructor who is standing by during and immediately after the training to answer any questions. Under these circumstances, a qualified instructor is available.

*Example 3 to paragraph (d):* In the preceding example, if no telephone had been provided at the training site or if a qualified instructor was not standing by to respond to any questions raised, there would not be a qualified instructor available. Merely providing the phone number of the qualified instructor would not satisfy the requirement that a qualified instructor be available.

(e) *Exceptions.* Verbal training without a qualified instructor available or written training prepared by a qualified instructor will satisfy the verbal training requirement for a public filer (or group of public filers) if one hour of official duty time is provided for the training and:

(1) The designated agency ethics official (or his or her designee) makes a written determination that it would be impractical to provide verbal training with a qualified instructor available; or

(2) The employee is a special Government employee.

*Example to paragraph (e)(1):* The only public filer in the American Embassy in Ulan Bator, Mongolia is the Ambassador. Because of the difference in time zones and the uncertainty of the Ambassador's schedule, the designated agency ethics official for the State Department is justified in making a written determination that it would be impractical to provide the Ambassador with verbal training. In this case, the Ambassador may receive written training prepared by a qualified instructor.

### § 2638.705 Annual ethics training for other employees.

(a) *Covered employees.* Each calendar year, agencies must train the following employees:

(1) Employees appointed by the President;

(2) Employees of the Executive Office of the President;

(3) Employees defined as confidential filers in 5 CFR 2634.904;

(4) Employees designated by their agency under 5 CFR 2634.601(b) to file confidential financial disclosure reports;

(5) Contracting officers, as defined in 41 U.S.C. 423(f)(5); and

(6) Other employees designated by the head of the agency or his or her designee based on their official duties.

NOTE TO PARAGRAPH (a): Employees described above who are also public filers must receive ethics training as provided in § 2638.704.

(b) *Content of training.* The requirements for the contents of annual training are the same as the requirements in § 2638.704(b).

(c) *Length and presentation of training.* The training for covered employees must consist of:

(1) A minimum of one hour of official duty time for verbal training at least once every three years. The verbal training must be presented by a qualified instructor or prepared by a qualified instructor and presented by telecommunications, computer, audiotape, or videotape; and

(2) An amount of official duty time the agency determines is sufficient for written training in the years in which the employee does not receive verbal training. The written training must be prepared by a qualified instructor. The employee's initial ethics orientation may satisfy the written training requirement for the same calendar year.

(d) *Exceptions.* Written ethics training prepared by a qualified instructor will satisfy the verbal training requirement for a covered employee (or group of covered employees) if sufficient official duty time is provided for the training and:

(1) The designated agency ethics official (or his or her designee) makes a written determination that verbal training would be impractical;

(2) The employee is a special Government employee expected to work 60 or fewer days in a calendar year;

(3) The employee is an officer in the uniformed services serving on active duty for 30 or fewer consecutive days; or



## Office of Government Ethics

## § 2640.101

(4) The employee is designated under paragraph (a)(6) of this section to receive training.

### § 2638.706 Agency's written plan for annual ethics training.

(a) The designated agency ethics official (or his or her designee) is responsible for directing the agency's ethics training program. The designated agency ethics official (or his or her designee) must develop a written plan each year for the agency's annual training program.

(b) The written plan must be completed by the beginning of each calendar year.

(c) The written plan must contain:

(1) A brief description of the agency's annual training.

(2) Estimates of the number of employees who will receive verbal training according to the following table:

Employees who will receive verbal training	Number
(i) Public filers.	
(ii) Employees other than public filers.	

(3) An estimate of the number of employees who will receive written training according to the following table:

Employees who will receive written training	Number
Employees other than public filers who will receive training under § 2638.705(c)(2).	

(4) Estimates of the number of employees who will receive written training instead of verbal training according to the following table:

Employees who will receive written training instead of verbal training	Number
(i) Public filers who qualify for the exception in § 2638.704(e)(1).	
(ii) Public filers who qualify for the exception in § 2638.704(e)(2).	
(iii) Employees other than public filers who qualify for the exception in § 2638.705(d)(1).	
(iv) Employees other than public filers who qualify for the exception in § 2638.705(d)(2).	
(v) Employees other than public filers who qualify for the exception in § 2638.705(d)(3).	
(vi) Employees other than public filers who qualify for the exception in § 2638.705(d)(4).	

(d) The written plan may contain any other information that the designated agency ethics official believes will assist the Office of Government Ethics in reviewing the agency's training program.

## PART 2640—INTERPRETATION, EXEMPTIONS AND WAIVER GUIDANCE CONCERNING 18 U.S.C. 208 (ACTS AFFECTING A PERSONAL FINANCIAL INTEREST)

### Subpart A—General Provisions

Sec.

2640.101 Purpose.

2640.102 Definitions.

2640.103 Prohibition.

### Subpart B—Exemptions Pursuant to 18 U.S.C. 208(b)(2)

2640.201 Exemptions for interests in mutual funds, unit investment trusts, and employee benefit plans.

2640.202 Exemptions for interests in securities.

2640.203 Miscellaneous exemptions.

2640.204 Prohibited financial interests.

2640.205 Employee responsibility.

2640.206 Existing agency exemptions.

### Subpart C—Individual Waivers

2640.301 Waivers issued pursuant to 18 U.S.C. 208(b)(1).

2640.302 Waivers issued pursuant to 18 U.S.C. 208(b)(3).

2640.303 Consultation and notification regarding waivers.

2640.304 Public availability of agency waivers.

AUTHORITY: 5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. 208; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

SOURCE: 61 FR 66841, Dec. 18, 1996, unless otherwise noted.

### Subpart A—General Provisions

#### § 2640.101 Purpose.

18 U.S.C. 208(a) prohibits an officer or employee of the executive branch, of any independent agency of the United States, of the District of Columbia, or Federal Reserve bank director, officer, or employee, or any special Government employee from participating in an official capacity in particular matters in which he has a personal financial interest, or in which certain persons or organizations with which he is affiliated have a financial interest. The statute is intended to prevent an employee from allowing personal interests to affect his official actions, and to

protect governmental processes from actual or apparent conflicts of interests. However, in certain cases, the nature and size of the financial interest and the nature of the matter in which the employee would act are unlikely to affect an employee's official actions. Accordingly, the statute permits waivers of the disqualification provision in certain cases, either on an individual basis or pursuant to general regulation. Section 208(b)(2) provides that the Director of the Office of Government Ethics may, by regulation, exempt from the general prohibition, financial interests which are too remote or too inconsequential to affect the integrity of the services of the employees to which the prohibition applies. The regulations in this part describe those financial interests. This part also provides guidance to agencies on the factors to consider when issuing individual waivers under 18 U.S.C. 208 (b)(1) or (b)(3), and provides an interpretation of 18 U.S.C. 208(a).

**§ 2640.102 Definitions.**

For purposes of this part:

(a) *Diversified* means that the fund, trust or plan does not have a stated policy of concentrating its investments in any industry, business, single country other than the United States, or bonds of a single State within the United States and, in the case of an employee benefit plan, means that the plan's trustee has a written policy of varying plan investments.

NOTE TO PARAGRAPH (a): A mutual fund is diversified for purposes of this part if it does not have a policy of concentrating its investments in an industry, business, country other than the United States, or single State within the United States. Whether a mutual fund meets this standard may be determined by checking the fund's prospectus or by calling a broker or the manager of the fund. An employee benefit plan is diversified if the plan manager has a written policy of varying assets. This policy might be found in materials describing the plan or may be obtained in a written statement from the plan manager. It is important to note that a mutual fund or employee benefit plan that is diversified for purposes of this part may not necessarily be an excepted investment fund (EIF) for purposes of reporting financial interests pursuant to 5 CFR 2634.310(c) and 2634.907(i)(3). In some cases, an employee may have to report the underlying assets of

a fund or plan on his financial disclosure statement even though an exemption set forth in this part would permit the employee to participate in a matter affecting the underlying assets of the fund or plan. Conversely, there may be situations in which no exemption in this part is applicable to the assets of a fund or plan which is properly reported as an EIF on the employee's financial disclosure statement.

(b) *Employee* means an officer or employee of the executive branch of the United States, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia. The term also includes a special Government employee as defined in 18 U.S.C. 202.

(c) *Employee benefit plan* means a plan as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3), and that has more than one participant. An employee benefit plan is any plan, fund or program established or maintained by an employer or an employee organization, or both, to provide its participants medical, disability, death, unemployment, or vacation benefits, training programs, day care centers, scholarship funds, prepaid legal services, deferred income, or retirement income.

(d) *He, his, and him* include she, hers, and her.

(e) *Holdings* means portfolio of investments.

(f) *Independent trustee* means a trustee who is independent of the sponsor and the participants in a plan, or is a registered investment advisor.

(g) *Institution of higher education* means an educational institution as defined in 20 U.S.C. 1141(a).

(h) *Issuer* means a person who issues or proposes to issue any security, or has any outstanding security which it has issued.

(i) *Long-term Federal Government security* means a bond or note, except for a U.S. Savings bond, with a maturity of more than one year issued by the United States Treasury pursuant to 31 U.S.C. chapter 31.

(j) *Municipal security* means direct obligation of, or obligation guaranteed as to principal or interest by, a State (or any of its political subdivisions, or any municipal corporate instrumentality of one or more States), or the District of

Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States.

(k) *Mutual fund* means an entity which is registered as a management company under the Investment Company Act of 1940, as amended (15 U.S.C. 80a-1 *et seq.*). For purposes of this part, the term mutual fund includes open-end and closed-end mutual funds and registered money market funds.

(l) *Particular matter involving specific parties* includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties. The term typically involves a specific proceeding affecting the legal rights of the parties, or an isolatable transaction or related set of transactions between identified parties.

(m) *Particular matter of general applicability* means a particular matter that is focused on the interests of a discrete and identifiable class of persons, but does not involve specific parties.

(n) *Pension plan* means any plan, fund or program maintained by an employer or an employee organization, or both, to provide retirement income to employees, or which results in deferral of income for periods extending to, or beyond, termination of employment.

(o) *Person* means an individual, corporation, company, association, firm, partnership, society or any other organization or institution.

(p) *Publicly traded security* means a security as defined in paragraph (r) of this section and which is:

(1) Registered with the Securities and Exchange Commission pursuant to section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) and listed on a national or regional securities exchange or traded through NASDAQ;

(2) Issued by an investment company registered pursuant to section 8 of the Investment Company Act of 1940, as amended (15 U.S.C. 80a-8); or

(3) A corporate bond registered as an offering with the Securities and Exchange Commission under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) and issued by an entity

whose stock is a publicly traded security.

NOTE TO PARAGRAPH (p): National securities exchanges include the American Stock Exchange and the New York Stock Exchange. Regional exchanges include Boston, Cincinnati, Intermountain (Salt Lake City), Midwest (Chicago), Pacific (Los Angeles and San Francisco), Philadelphia (Philadelphia and Miami), and Spokane stock exchanges.

(q) *Sector mutual fund or sector unit investment trust* means a mutual fund or unit investment trust that concentrates its investments in an industry, business, single country other than the United States, or bonds of a single State within the United States.

(r) *Security* means common stock, preferred stock, corporate bond, municipal security, long-term Federal Government security, and limited partnership interest. The term also includes “mutual fund” for purposes of § 2640.202(e) and (f) and § 2640.203(a).

(s) *Short-term Federal Government security* means a bill with a maturity of one year or less issued by the United States Treasury pursuant to 31 U.S.C. chapter 31.

(t) *Special Government employee* means those executive branch officers or employees specified in 18 U.S.C. 202(a). A special Government employee is retained, designated, appointed or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for a period not to exceed 130 days during any consecutive 365-day period.

(u) *Unit investment trust* means an investment company as defined in 15 U.S.C. 80a-4(2) that is a regulated investment company under 26 U.S.C. 851.

(v) *United States Savings bond* means a savings bond issued by the United States Treasury pursuant to 31 U.S.C. 3105.

[61 FR 66841, Dec. 18, 1996, as amended at 67 FR 12445, Mar. 19, 2002; 71 FR 28239, May 16, 2006; 78 FR 14441, Mar. 6, 2013]

### § 2640.103 Prohibition.

(a) *Statutory prohibition.* Unless permitted by 18 U.S.C. 208(b) (1)–(4), an employee is prohibited by 18 U.S.C. 208(a) from participating personally and substantially in an official capacity in any particular matter in which,

to his knowledge, he or any other person specified in the statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest. The restrictions of 18 U.S.C. 208 are described more fully in 5 CFR 2635.401 and 2635.402.

(1) *Particular matter*. The term “particular matter” includes only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. The term may include matters which do not involve formal parties and may extend to legislation or policy making that is narrowly focused on the interests of a discrete and identifiable class of persons. It does not, however, cover consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons. The particular matters covered by this part include a judicial or other proceeding, application or request for a ruling or other determination, contract, claim, controversy, charge, accusation or arrest.

*Example 1:* The Overseas Private Investment Corporation decides to hire a contractor to conduct EEO training for its employees. The award of a contract for training services is a particular matter.

*Example 2:* The spouse of a high level official of the Internal Revenue Service (IRS) requests a meeting on behalf of her client (a major U.S. corporation) with IRS officials to discuss a provision of IRS regulations governing depreciation of equipment. The spouse will be paid a fee by the corporation for arranging and attending the meeting. The consideration of the spouse's request and the decision to hold the meeting are particular matters in which the spouse has a financial interest.

*Example 3:* A regulation published by the Department of Agriculture applicable only to companies that operate meat packing plants is a particular matter.

*Example 4:* A change by the Department of Labor to health and safety regulations applicable to all employers in the United States is not a particular matter. The change in the regulations is directed to the interests of a large and diverse group of persons.

*Example 5:* The allocation of additional resources to the investigation and prosecution of white collar crime by the Department of Justice is not a particular matter. Similarly, deliberations on the general merits of an omnibus bill such as the Tax Reform Act of 1986 are not sufficiently focused on the interests of specific persons, or a discrete and identifiable

group of persons to constitute participation in a particular matter.

*Example 6:* The recommendations of the Council of Economic Advisors to the President about appropriate policies to maintain economic growth and stability are not particular matters. Discussions about economic growth policies are directed to the interests of a large and diverse group of persons.

*Example 7:* The formulation and implementation of the response of the United States to the military invasion of a U.S. ally is not a particular matter. General deliberations, decisions and actions concerning a response are based on a consideration of the political, military, diplomatic and economic interests of every sector of society and are too diffuse to be focused on the interests of specific individuals or entities. However, at the time consideration is given to actions focused on specific individuals or entities, or a discrete and identifiable class of individuals or entities, the matters under consideration would be particular matters. These would include, for example, discussions whether to close a particular oil pumping station or pipeline in the area where hostilities are taking place, or a decision to seize a particular oil field or oil tanker.

*Example 8:* A legislative proposal for broad health care reform is not a particular matter because it is not focused on the interests of specific persons, or a discrete and identifiable class of persons. It is intended to affect every person in the United States. However, consideration and implementation, through regulations, of a section of the health care bill limiting the amount that can be charged for prescription drugs is sufficiently focused on the interests of pharmaceutical companies that it would be a particular matter.

(2) *Personal and substantial participation*. To participate “personally” means to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter. To participate “substantially” means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may

be substantial. Personal and substantial participation may occur when, for example, an employee participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice in a particular matter.

*Example 1 to paragraph (a)(2):* An agency's Office of Enforcement is investigating the allegedly fraudulent marketing practices of a major corporation. One of the agency's personnel specialists is asked to provide information to the Office of Enforcement about the agency's personnel ceiling so that the Office can determine whether new employees can be hired to work on the investigation. The employee personnel specialist owns \$20,000 worth of stock in the corporation that is the target of the investigation. She does not have a disqualifying financial interest in the matter (the investigation and possible subsequent enforcement proceedings) because her involvement is on a peripheral personnel issue and her participation cannot be considered "substantial" as defined in the statute.

(3) *Direct and predictable effect.* (i) A particular matter will have a "direct" effect on a financial interest if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest. An effect may be direct even though it does not occur immediately. A particular matter will not have a direct effect on a financial interest, however, if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter. A particular matter that has an effect on a financial interest only as a consequence of its effects on the general economy does not have a direct effect within the meaning of this part.

(ii) A particular matter will have a "predictable" effect if there is a real, as opposed to a speculative, possibility that the matter will affect the financial interest. It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial.

*Example 1:* An attorney at the Department of Justice is working on a case in which several large companies are defendants. If the Department wins the case, the defendants may be required to reimburse the Federal Government for their failure to adequately perform work under several contracts with

the Government. The attorney's spouse is a salaried employee of one of the companies, working in a division that has no involvement in any of the contracts. She does not participate in any bonus or benefit plans tied to the profitability of the company, nor does she own stock in the company. Because there is no evidence that the case will have a direct and predictable effect on whether the spouse will retain her job or maintain the level of her salary, or whether the company will undergo any reorganization that would affect her interests, the attorney would not have a disqualifying financial interest in the matter. However, the attorney must consider, under the requirements of § 2635.502 of this chapter, whether his impartiality would be questioned if he continues to work on the case.

*Example 2:* A special Government employee (SGE) whose principal employment is as a researcher at a major university is appointed to serve on an advisory committee that will evaluate the safety and effectiveness of a new medical device to regulate arrhythmic heartbeats. The device is being developed by Alpha Medical Inc., a company which also has contracted with the SGE's university to assist in developing another medical device related to kidney dialysis. There is no evidence that the advisory committee's determinations concerning the medical device under review will affect Alpha Medical's contract with the university to develop the kidney dialysis device. The SGE may participate in the committee's deliberations because those deliberations will not have a direct and predictable effect on the financial interests of the researcher or his employer.

*Example 3:* The SGE in the preceding example is instead asked to serve on an advisory committee that has been convened to conduct a preliminary evaluation of the new kidney dialysis device developed by Alpha Medical under contract with the employee's university. Alpha's contract with the university requires the university to undertake additional testing of the device to address issues raised by the committee during its review. The committee's actions will have a direct and predictable effect on the university's financial interest.

*Example 4:* An engineer at the Environmental Protection Agency (EPA) was formerly employed by Waste Management, Inc., a corporation subject to EPA's regulations concerning the disposal of hazardous waste materials. Waste Management is a large corporation, with less than 5% of its profits derived from handling hazardous waste materials. The engineer has a vested interest in a defined benefit pension plan sponsored by Waste Management which guarantees that he will receive payments of \$500 per month beginning at age 62. As an employee of EPA, the engineer has been assigned to evaluate Waste Management's compliance with EPA

hazardous waste regulations. There is no evidence that the engineer's monitoring activities will affect Waste Management's ability or willingness to pay his pension benefits when he is entitled to receive them at age 62. Therefore, the EPA's monitoring activities will not have a direct and predictable effect on the employee's financial interest in his Waste Management pension. However, the engineer should consider whether, under the standards set forth in 5 CFR 2635.502, a reasonable person would question his impartiality if he acts in a matter in which Waste Management is a party.

(b) *Disqualifying financial interests.* For purposes of 18 U.S.C. 208(a) and this part, the term financial interest means the potential for gain or loss to the employee, or other person specified in section 208, as a result of governmental action on the particular matter. The disqualifying financial interest might arise from ownership of certain financial instruments or investments such as stock, bonds, mutual funds, or real estate. Additionally, a disqualifying financial interest might derive from a salary, indebtedness, job offer, or any similar interest that may be affected by the matter.

*Example 1:* An employee of the Department of the Interior owns transportation bonds issued by the State of Minnesota. The proceeds of the bonds will be used to fund improvements to certain State highways. In her official position, the employee is evaluating an application from Minnesota for a grant to support a State wildlife refuge. The employee's ownership of the transportation bonds does not create a disqualifying financial interest in Minnesota's application for wildlife funds because approval or disapproval of the grant will not in any way affect the current value of the bonds or have a direct and predictable effect on the State's ability or willingness to honor its obligation to pay the bonds when they mature.

*Example 2:* An employee of the Bureau of Land Management owns undeveloped land adjacent to Federal lands in New Mexico. A portion of the Federal land will be leased by the Bureau to a mining company for exploration and development, resulting in an increase in the value of the surrounding privately owned land, including that owned by the employee. The employee has a financial interest in the lease of the Federal land to the mining company and, therefore, cannot participate in Bureau matters involving the lease unless he obtains an individual waiver pursuant to 18 U.S.C. 208(b)(1).

*Example 3:* A special Government employee serving on an advisory committee studying the safety and effectiveness of a new arthri-

tis drug is a practicing physician with a specialty in treating arthritis. The drug being studied by the committee would be a low cost alternative to current treatments for arthritis. If the drug is ultimately approved, the physician will be able to prescribe the less expensive drug. The physician does not own stock in, or hold any position, or have any business relationship with the company developing the drug. Moreover, there is no indication that the availability of a less expensive treatment for arthritis will increase the volume and profitability of the doctor's private practice. Accordingly, the physician has no disqualifying financial interest in the actions of the advisory committee.

(c) *Interests of others.* The financial interests of the following persons will serve to disqualify an employee to the same extent as the employee's own interests:

- (1) The employee's spouse;
- (2) The employee's minor child;
- (3) The employee's general partner;
- (4) An organization or entity which the employee serves as officer, director, trustee, general partner, or employee; and
- (5) A person with whom the employee is negotiating for, or has an arrangement concerning, prospective employment.

*Example 1:* An employee of the Consumer Product Safety Commission (CPSC) has two minor children who have inherited shares of stock from their grandparents in a company that manufactures small appliances. Unless an exemption is applicable under § 2640.202 or he obtains a waiver under 18 U.S.C. 208(b)(1), the employee is disqualified from participating in a CPSC proceeding to require the manufacturer to remove a defective appliance from the market.

*Example 2:* A newly appointed employee of the Department of Housing and Urban Development (HUD) is a general partner with three former business associates in a partnership that owns a travel agency. The employee knows that his three general partners are also partners in another partnership that owns a HUD-subsidized housing project. Unless he receives a waiver pursuant to 18 U.S.C. 208(b)(1) permitting him to act, the employee must disqualify himself from particular matters involving the HUD-subsidized project which his general partners own.

*Example 3:* The spouse of an employee of the Department of Health and Human Services (HHS) works for a consulting firm that provides support services to colleges and universities on research projects they are conducting under grants from HHS. The spouse is a salaried employee who has no direct

ownership interest in the firm such as through stockholding, and the award of a grant to a particular university will have no direct and predictable effect on his continued employment or his salary. Because the award of a grant will not affect the spouse's financial interest, section 208 would not bar the HHS employee from participating in the award of a grant to a university to which the consulting firm will provide services. However, the employee should consider whether her participation in the award of the grant would be barred under the impartiality provision in the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR 2635.502.

(d) *Disqualification.* Unless the employee is authorized to participate in the particular matter by virtue of an exemption or waiver described in subpart B or subpart C of this part, or the interest has been divested in accordance with paragraph (e) of this section, an employee shall disqualify himself from participating in a particular matter in which, to his knowledge, he or any other person specified in the statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest. Disqualification is accomplished by not participating in the particular matter.

(1) *Notification.* An employee who becomes aware of the need to disqualify himself from participation in a particular matter to which he has been assigned should notify the person responsible for his assignment. An employee who is responsible for his own assignments should take whatever steps are necessary to ensure that he does not participate in the matter from which he is disqualified. Appropriate oral or written notification of the employee's disqualification may be made to coworkers by the employee or a supervisor to ensure that the employee is not involved in a matter from which he is disqualified.

(2) *Documentation.* An employee need not file a written disqualification statement unless he is required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics, is asked by an agency ethics official or the person responsible for his assignment to file a written disqualification statement, or is required to do so by agency supplemental regulation issued pursuant to 5 CFR

2635.105. However, an employee may elect to create a record of his actions by providing written notice to a supervisor or other appropriate official.

*Example 1:* The supervisor of an employee of the Department of Education asks the employee to attend a meeting on his behalf on developing national standards for science education in secondary schools. When the employee arrives for the meeting, she realizes one of the participants is the president of Education Consulting Associates (ECA), a firm which has been awarded a contract to prepare a bulletin describing the Department's policies on science education standards. The employee's spouse has a sub-contract with ECA to provide the graphics and charts that will be used in the bulletin. Because the employee realizes that the meeting will involve matters relating to the production of the bulletin, the employee properly decides that she must disqualify herself from participating in the discussions. After withdrawing from the meeting, the employee should notify her supervisor about the reason for her disqualification. She may elect to put her disqualification statement in writing, or to simply notify her supervisor orally. She may also elect to notify appropriate coworkers about her need to disqualify herself from this matter.

(e) *Divestiture of a disqualifying financial interest.* Upon sale or other divestiture of the asset or other interest that causes his disqualification from participation in a particular matter, an employee is no longer prohibited from acting in the particular matter.

(1) *Voluntary divestiture.* An employee who would otherwise be disqualified from participation in a particular matter may voluntarily sell or otherwise divest himself of the interest that causes the disqualification.

(2) *Directed divestiture.* An employee may be required to sell or otherwise divest himself of the disqualifying financial interest if his continued holding of that interest is prohibited by statute or by agency supplemental regulation issued in accordance with §2635.403(a) of this chapter, or if the agency determines in accordance with §2635.403(b) of this chapter that a substantial conflict exists between the financial interest and the employee's duties or accomplishment of the agency's mission.

(3) *Eligibility for special tax treatment.* An employee who is directed to divest an interest may be eligible to defer the tax consequences of divestiture under

subpart J of part 2634 of this chapter. An employee who divests before obtaining a certificate of divestiture will not be eligible for this special tax treatment.

(f) *Official duties that give rise to potential conflicts.* Where an employee's official duties create a substantial likelihood that the employee may be assigned to a particular matter from which he is disqualified, the employee should advise his supervisor or other person responsible for his assignments of that potential so that conflicting assignments can be avoided, consistent with the agency's needs.

[61 FR 66841, Dec. 18, 1996, as amended at 67 FR 12445, Mar. 19, 2002]

### Subpart B—Exemptions Pursuant to 18 U.S.C. 208(b)(2)

#### § 2640.201 Exemptions for interests in mutual funds, unit investment trusts, and employee benefit plans.

(a) *Diversified mutual funds and unit investment trusts.* An employee may participate in any particular matter affecting one or more holdings of a diversified mutual fund or a diversified unit investment trust where the disqualifying financial interest in the matter arises because of the ownership of an interest in the fund or trust.

*Example 1 to paragraph (a):* An employee owns shares worth \$100,000 in several mutual funds whose portfolios contain stock in a small computer company. Each mutual fund prospectus describes the fund as a “management company,” but does not characterize the fund as having a policy of concentrating its investments in any particular industry, business, single country (other than the U.S.) or bonds of a single State. The employee may participate in agency matters affecting the computer company.

*Example 2 to paragraph (a):* A non-supervisory employee of the Department of Energy owns shares valued at \$75,000 in a mutual fund that expressly concentrates its holdings in the stock of utility companies. The employee may not rely on the exemption in paragraph (a) of this section to act in matters affecting a utility company whose stock is a part of the mutual fund's portfolio because the fund is not a diversified fund as defined in §2640.102(a). The employee may, however, seek an individual waiver under 18 U.S.C. 208(b)(1) permitting him to act.

(b) *Sector mutual funds.* (1) An employee may participate in any particular matter affecting one or more holdings of a sector mutual fund or a sector unit investment trust where the affected holding is not invested in the sector in which the fund or trust concentrates, and where the disqualifying financial interest in the matter arises because of ownership of an interest in the fund or unit investment trust.

(2)(i) An employee may participate in a particular matter affecting one or more holdings of a sector mutual fund or a sector unit investment trust where the disqualifying financial interest in the matter arises because of ownership of an interest in the fund or the unit investment trust and the aggregate market value of interests in any sector fund or funds and any sector unit investment trust or trusts does not exceed \$50,000.

(ii) For purposes of calculating the \$50,000 de minimis amount in paragraph (b)(2)(i) of this section, an employee must aggregate the market value of all sector mutual funds and sector unit investment trusts in which he has a disqualifying financial interest and that concentrate in the same sector and have one or more holdings that may be affected by the particular matter.

*Example 1 to paragraph (b):* An employee of the Federal Reserve owns shares in the mutual fund described in the preceding example. In addition to holdings in utility companies, the mutual fund contains stock in certain regional banks and bank holding companies whose financial interests would be affected by an investigation in which the Federal Reserve employee would participate. The employee is not disqualified from participating in the investigation because the banks that would be affected are not part of the sector in which the fund concentrates.

*Example 2 to paragraph (b):* A health scientist administrator employed in the Public Health Service at the Department of Health and Human Services is assigned to serve on a Departmentwide task force that will recommend changes in how Medicare reimbursements will be made to health care providers. The employee owns \$35,000 worth of shares in the XYZ Health Sciences Fund, a sector mutual fund invested primarily in health-related companies such as pharmaceuticals, developers of medical instruments and devices, managed care health organizations, and acute care hospitals. The health



scientist administrator may participate in the recommendations.

*Example 3 to paragraph (b):* The spouse of the employee in the previous Example owns \$40,000 worth of shares in ABC Specialized Portfolios: Healthcare, a sector mutual fund that also concentrates its investments in health-related companies. The two funds focus on the same sector and both contain holdings that may be affected by the particular matter. Because the aggregated value of the two funds exceeds \$50,000, the employee may not rely on the exemption.

(c) *Employee benefit plans.* An employee may participate in:

(1) Any particular matter affecting one or more holdings of an employee benefit plan, where the disqualifying financial interest in the matter arises from membership in:

(i) The Thrift Savings Plan for Federal employees described in 5 U.S.C. 8437;

(ii) A pension plan established or maintained by a State government or any political subdivision of a State government for its employees; or

(iii) A diversified employee benefit plan, *provided:*

(A) The investments of the plan are administered by an independent trustee, and the employee, or other person specified in section 208(a) does not participate in the selection of the plan's investments or designate specific plan investments (except for directing that contributions be divided among several different categories of investments, such as stocks, bonds or mutual funds, which are available to plan participants); and

(B) The plan is not a profit-sharing or stock bonus plan.

NOTE TO PARAGRAPH (c)(1): Employee benefit plans that are tax deferred under 26 U.S.C. 401(k) are not considered profit-sharing plans for purposes of this section. However, for the exemption to apply, 401(k) plans must meet the requirements of paragraph (c)(1)(iii)(A) of this section.

(2) Particular matters of general applicability, such as rulemaking, affecting the State or local government sponsor of a State or local government pension plan described in paragraph (c)(1)(ii) of this section where the disqualifying financial interest in the matter arises because of participation in the plan.

*Example 1:* An attorney terminates his position with a law firm to take a position with the Department of Justice. As a result of his employment with the firm, the employee has interests in a 401(k) plan, the assets of which are invested primarily in stocks chosen by an independent financial management firm. He also participates in a defined contribution pension plan maintained by the firm, the assets of which are stocks, bonds, and financial instruments. The plan is managed by an independent trustee. Assuming that the manager of the pension plan has a written policy of diversifying plan investments, the employee may act in matters affecting the plan's holdings. The employee may also participate in matters affecting the holdings of his 401(k) plan if the individual financial management firm that selects the plan's investments has a written policy of diversifying the plan's assets. Employee benefit plans that are tax deferred under 26 U.S.C. 401(k) are not considered profit-sharing or stock bonus plans for purposes of this part.

*Example 2:* An employee of the Department of Agriculture who is a former New York State employee has a vested interest in a pension plan established by the State of New York for its employees. She may participate in an agency matter that would affect a company whose stock is in the pension plan's portfolio. She also may participate in a matter of general applicability affecting all States, including the State of New York, such as the drafting and promulgation of a rule requiring States to expend additional resources implementing the Food Stamp program. Unless she obtains an individual waiver under 18 U.S.C. 208(b)(1), she may not participate in a matter involving the State of New York as a party, such as an application by the State for additional Federal funding for administrative support services, if that matter would affect the State's ability or willingness to honor its obligation to pay her pension benefits.

(d) *Matters affecting mutual funds and unit investment trusts.* In addition to participation in the particular matters affecting the holdings of mutual funds and unit investment trusts as permitted under paragraphs (a) and (b) of this section, an employee may participate in any particular matter of general applicability affecting a mutual fund or unit investment trust where the disqualifying financial interest arises because of the ownership of an

## § 2640.202

interest in the mutual fund or unit investment trust.

[61 FR 66841, Dec. 18, 1996; 62 FR 1361, Jan. 9, 1997, as amended at 67 FR 12445, Mar. 19, 2002; 70 FR 69043, Nov. 14, 2005; 78 FR 14442, Mar. 6, 2013]

### § 2640.202 Exemptions for interests in securities.

(a) *De minimis exemption for matters involving parties.* An employee may participate in any particular matter involving specific parties in which the disqualifying financial interest arises from the ownership by the employee, his spouse or minor children of securities issued by one or more entities affected by the matter, if:

(1) The securities are publicly traded, or are long-term Federal Government, or are municipal securities; and

(2) The aggregate market value of the holdings of the employee, his spouse, and his minor children in the securities of all entities does not exceed \$15,000.

*Example 1 to paragraph (a):* An employee owns 100 shares of publicly traded stock valued at \$3,000 in XYZ Corporation. As part of his official duties, the employee is evaluating bids for performing computer maintenance services at his agency and discovers that XYZ Corporation is one of the companies that has submitted a bid. The employee is not required to recuse himself from continuing to evaluate the bids.

*Example 2 to paragraph (a):* In the preceding example, the employee and his spouse each own \$8,000 worth of stock in XYZ Corporation, resulting in ownership of \$16,000 worth of stock by the employee and his spouse. The exemption in paragraph (a) of this section would not permit the employee to participate in the evaluation of bids because the aggregate market value of the holdings of the employee, spouse and minor children in XYZ Corporation exceeds \$15,000. The employee could, however, seek an individual waiver under 18 U.S.C. 208(b)(1) in order to participate in the evaluation of bids.

*Example 3 to paragraph (a):* An employee is assigned to monitor XYZ Corporation's performance of a contract to provide computer maintenance services at the employee's agency. At the time the employee is first assigned these duties, he owns publicly traded stock in XYZ Corporation valued at less than \$15,000. During the time the contract is being performed, however, the value of the employee's stock increases to \$17,500. When the employee knows that the value of his stock exceeds \$15,000, he must disqualify himself from any further participation in matters affecting XYZ Corporation or seek

## 5 CFR Ch. XVI (1–1–16 Edition)

an individual waiver under 18 U.S.C. 208(b)(1). Alternatively, the employee may divest the portion of his XYZ stock that exceeds \$15,000. This can be accomplished through a standing order with his broker to sell when the value of the stock exceeds \$15,000.

(b) *De minimis exemption for matters affecting nonparties.* An employee may participate in any particular matter involving specific parties in which the disqualifying financial interest arises from the ownership by the employee, his spouse, or minor children of securities issued by one or more entities that are not parties to the matter but that are affected by the matter, if:

(1) The securities are publicly traded, or are long-term Federal Government or municipal securities; and

(2) The aggregate market value of the holdings of the employee, his spouse and minor children in the securities of all affected entities (including securities exempted under paragraph (a) of this section) does not exceed \$25,000.

*Example 1 to paragraph (b):* A Food and Drug Administration advisory committee is asked to review a new drug application from Alpha Drug Co. for a new lung cancer drug. A member of the advisory committee owns \$20,000 worth of stock in Mega Drug Co., which manufactures the only similar lung cancer drug on the market. If approved, the Alpha Drug Co.'s drug would directly compete with the drug sold by the Mega Drug Co., resulting in decreased sales of its lung cancer drug. The committee member may participate in the review of the new drug.

(c) *De minimis exemption for matters of general applicability.* (1) An employee may participate in any particular matter of general applicability, such as rulemaking, in which the disqualifying financial interest arises from the ownership by the employee, his spouse or minor children of securities issued by one or more entities affected by the matter, if:

(i) The securities are publicly traded, or are municipal securities, the market value of which does not exceed:

(A) \$25,000 in any one such entity; and

(B) \$50,000 in all affected entities; or

(ii) The securities are long-term Federal Government securities, the market value of which does not exceed \$50,000.

(2) For purposes of this paragraph (b), the value of securities owned by the

employee, his spouse, and minor children must be aggregated in applying the exemption.

*Example 1 to paragraph (c):* The Bureau of Export Administration at the Department of Commerce is in the process of formulating a regulation concerning exportation of portable computers. The regulation will affect all domestic companies that sell portable computers. An employee of the Department who is assisting in drafting the regulation owns \$17,000 worth of stock in CompAmerica and \$20,000 worth of stock in XYZ Computer Inc. Even though the employee owns \$37,000 worth of stock in companies that will be affected by the regulation, she may participate in drafting the regulation because the value of the securities she owns does not exceed \$25,000 in any one affected company and the total value of stock owned in all affected companies does not exceed \$50,000.

(d) *Exemption for certain Federal Government securities.* An employee may participate in any particular matter in which the disqualifying financial interest arises from the ownership of short-term Federal Government securities or from U.S. Savings bonds.

(e) *Exemption for interests of tax-exempt organizations.* An employee may participate in any particular matter in which the disqualifying financial interest arises from the ownership of publicly traded or municipal securities, or long-term Federal Government securities by an organization which is tax-exempt pursuant to 26 U.S.C. 501(c) (3) or (4), and of which the employee is an unpaid officer, director, or trustee, or an employee, if:

(1) The matter affects only the organization's investments, not the organization directly;

(2) The employee plays no role in making investment decisions for the organization, except for participating in the decision to invest in several different categories of investments such as stocks, bonds, or mutual funds; and

(3) The organization's only relationship to the issuer, other than that which arises from routine commercial transactions, is that of investor.

*Example 1:* An employee of the Federal Reserve is a director of the National Association to Save Trees (NAST), an environmental organization that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. The employee knows that NAST has an endowment fund that is partially invested in the publicly traded stock of Com-

puter Inc. The employee's position at the Federal Reserve involves the procurement of computer software, including software marketed by Computer Inc. The employee may participate in the procurement of software from Computer Inc. provided that he is not involved in selecting NAST's investments, and that NAST has no relationship to Computer Inc. other than as an investor in the company and routine purchaser of Computer Inc. software.

(f) *Exemption for certain interests of general partners.* An employee may participate in any particular matter in which the disqualifying financial interest arises from:

(1) The ownership of publicly traded securities, long-term Federal Government securities, or municipal securities by the employee's general partner, provided:

(i) Ownership of the securities is not related to the partnership between the employee and his general partner, and

(ii) The value of the securities does not exceed \$200,000; or

(2) Any interest of the employee's general partner if the employee's relationship to the general partner is as a limited partner in a partnership that has at least 100 limited partners.

*Example 1:* An employee of the Department of Transportation is a general partner in a partnership that owns commercial property. The employee knows that one of his partners owns stock in an aviation company valued at \$100,000 because the stock has been pledged as collateral for the purchase of the commercial property by the partnership. In the absence of an individual waiver under 18 U.S.C. 208(b)(1), the employee may not act in a matter affecting the aviation company. Because the stock has been pledged as collateral, ownership of the securities is related to the partnership between the employee and his general partner.

*Example 2:* An employee of the Pension Benefit Guaranty Corporation (PBGC) has a limited partnership interest in Ambank Partners, a large partnership with more than 500 limited partners. The partnership assets are invested in the securities of various financial institutions. Ambank's general partner is Capital Investment Services, an investment firm whose pension plan for its own employees is being examined by the PBGC for possible unfunded liabilities. Even though the employee's general partner (Capital Investment Services) has a financial interest in PBGC's review of the pension plan, the employee may participate in the review because his relationship with his general

partner is that of a limited partner in a partnership that has at least 100 limited partners.

[61 FR 66841, Dec. 18, 1996; 62 FR 1361, Jan. 9, 1997, as amended at 67 FR 12445, Mar. 19, 2002]

**§ 2640.203 Miscellaneous exemptions.**

(a) *Hiring decisions.* An employee may participate in a hiring decision involving an applicant who is currently employed by a corporation that issues publicly traded securities, if the disqualifying financial interest arises from:

- (1) Ownership of publicly traded securities issued by the corporation; or
- (2) Participation in a pension plan sponsored by the corporation.

(b) *Employees on leave from institutions of higher education.* An employee on a leave of absence from an institution of higher education may participate in any particular matter of general applicability affecting the financial interests of the institution from which he is on leave, *provided* that the matter will not have a special or distinct effect on that institution other than as part of a class.

*Example 1:* An employee at the Department of Defense (DOD) is on a leave of absence from his position as a tenured Professor of Engineering at the University of California (UC) at Berkeley. While at DOD, he is assigned to assist in developing a regulation which will contain new standards for the oversight of grants given by DOD. Even though the University of California at Berkeley is a DOD grantee, and will be affected by these new monitoring standards, the employee may participate in developing the standards because UC Berkeley will be affected only as part of the class of all DOD grantees. However, if the new standards would affect the employee's own financial interest, such as by affecting his tenure or his salary, the employee could not participate in the matter unless he first obtains an individual waiver under section 208(b)(1).

*Example 2:* An employee on leave from a university could not participate in the development of an agency program of grants specifically designed to facilitate research in jet propulsion systems where the employee's university is one of just two or three universities likely to receive a grant under the new program. Even though the grant announcement is open to all universities, the employee's university is among the very few known to have facilities and equipment adequate to conduct the research. The matter would have

a distinct effect on the institution other than as part of a class.

(c) *Multi-campus institutions of higher education.* An employee may participate in any particular matter affecting one campus of a State multi-campus institution of higher education, if the employee's disqualifying financial interest is employment in a position with no multi-campus responsibilities at a separate campus of the same multi-campus institution.

*Example 1:* A special Government employee (SGE) member of an advisory committee convened by the National Science Foundation is a full-time professor in the School of Engineering at one campus of a State university. The SGE may participate in formulating the committee's recommendation to award a grant to a researcher at another campus of the same State university system.

*Example 2:* A member of the Board of Regents at a State university is asked to serve on an advisory committee established by the Department of Health and Human Services to consider applications for grants for human genome research projects. An application from another university that is part of the same State system will be reviewed by the committee. Unless he receives an individual waiver under section 208(b)(1) or (b)(3), the advisory committee member may not participate in matters affecting the second university that is part of the State system because as a member of the Board of Regents, he has duties and responsibilities that affect the entire State educational system.

(d) *Exemptions for financial interests arising from Federal Government employment or from Social Security or veterans' benefits.* An employee may participate in any particular matter where the disqualifying financial interest arises from Federal Government or Federal Reserve Bank salary or benefits, or from Social Security or veterans' benefits, except an employee may not:

- (1) Make determinations that individually or specially affect his own salary and benefits; or
- (2) Make determinations, requests, or recommendations that individually or specially relate to, or affect, the salary or benefits of any other person specified in section 208.

*Example 1:* An employee of the Office of Management and Budget may vigorously and energetically perform the duties of his position even though his outstanding performance would result in a performance bonus or other similar merit award.

*Example 2:* A policy analyst at the Defense Intelligence Agency may request promotion to another grade or salary level. However, the analyst may not recommend or approve the promotion of her general partner to the next grade.

*Example 3:* An engineer employed by the National Science Foundation may request that his agency pay the registration fees and appropriate travel expenses required for him to attend a conference sponsored by the Engineering Institute of America. However, the employee may not approve payment of his own travel expenses and registration fees unless he has been delegated, in advance, authority to make such approvals in accordance with agency policy.

*Example 4:* A GS-14 attorney at the Department of Justice may review and make comments about the legal sufficiency of a bill to raise the pay level of all Federal employees paid under the General Schedule even though her own pay level, and that of her spouse who works at the Department of Labor, would be raised if the bill were to become law.

*Example 5:* An employee of the Department of Veterans Affairs (VA) may assist in drafting a regulation that will provide expanded hospital benefits for veterans, even though he himself is a veteran who would be eligible for treatment in a hospital operated by the VA.

*Example 6:* An employee of the Office of Personnel Management may participate in discussions with various health insurance providers to formulate the package of benefits that will be available to Federal employees who participate in the Government's Federal Employees Health Benefits Program, even though the employee will obtain health insurance from one of these providers through the program.

*Example 7:* An employee of the Federal Supply Service Division of the General Services Administration (GSA) may participate in GSA's evaluation of the feasibility of privatizing the entire Federal Supply Service, even though the employee's own position would be eliminated if the Service were privatized.

*Example 8:* Absent an individual waiver under section 208(b)(1), the employee in the preceding example could not participate in the implementation of a GSA plan to create an employee-owned private corporation which would carry out Federal Supply Service functions under contract with GSA. Because implementing the plan would result not only in the elimination of the employee's Federal position, but also in the creation of a new position in the new corporation to which the employee would be transferred, the employee would have a disqualifying financial interest in the matter arising from other than Federal salary and benefits, or Social Security or veterans benefits.

*Example 9:* A career member of the Senior Executive Service (SES) at the Internal Revenue Service (IRS) may serve on a performance review board that makes recommendations about the performance awards that will be awarded to other career SES employees at the IRS. The amount of the employee's own SES performance award would be affected by the board's recommendations because all SES awards are derived from the same limited pool of funds. However, the employee's activities on the board involve only recommendations, and not determinations that individually or specially affect his own award. Additionally, 5 U.S.C. 5384(c)(2) requires that a majority of the board's members be career SES employees.

*Example 10:* In carrying out a reorganization of the Office of General Counsel (OGC) of the Federal Trade Commission, the Deputy General Counsel is asked to determine which of five Senior Executive Service (SES) positions in the OGC to abolish. Because her own position is one of the five SES positions being considered for elimination, the matter is one that would individually or specially affect her own salary and benefits and, therefore, the Deputy may not decide which position should be abolished.

NOTE TO PARAGRAPH (d): This exemption does not permit an employee to take any action in violation of any other statutory or regulatory requirement, such as the prohibition on the employment of relatives at 5 U.S.C. 3110.

(e) *Commercial discount and incentive programs.* An employee may participate in any particular matter affecting the sponsor of a discount, incentive, or other similar benefit program if the disqualifying financial interest arises because of participation in the program, *provided:*

(1) The program is open to the general public; and

(2) Participation in the program involves no other financial interest in the sponsor, such as stockholding.

*Example 1:* An attorney at the Pension Benefit Guaranty Corporation who is a member of a frequent flier program sponsored by Alpha Airlines may assist in an action against Alpha for failing to make required payments to its employee pension fund, even though the agency action will cause Alpha to disband its frequent flier program.

(f) *Mutual insurance companies.* An employee may participate in any particular matter affecting a mutual insurance company if the disqualifying financial interest arises because of an interest as a policyholder, unless the matter would affect the company's

ability to pay claims required under the terms of the policy or to pay the cash value of the policy.

*Example 1:* An administrative law judge at the Department of Labor receives dividends from a mutual insurance company which he takes in the form of reduced premiums on his life insurance policy. The amount of the dividend is based upon the company's overall profitability. Nevertheless, he may preside in a Department hearing involving a major corporation insured by the same company even though the insurance company will have to pay the corporation's penalties and other costs if the Department prevails in the hearing.

*Example 2:* An employee of the Department of Justice is assigned to prosecute a case involving the fraudulent practices of an issuer of junk bonds. While developing the facts pertinent to the case, the employee learns that the mutual life insurance company from which he holds a life insurance policy has invested heavily in these junk bonds. If the Government succeeds in its case, the bonds will be worthless and the corresponding decline in the insurance company's investments will impair the company's ability to pay claims under the policies it has issued. The employee may not continue assisting in the prosecution of the case unless he obtains an individual waiver pursuant to section 208(b)(1).

(g) *Exemption for employment interests of special Government employees serving on advisory committees.* A special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act (5 U.S.C. app.) may participate in any particular matter of general applicability where the disqualifying financial interest arises from his non-Federal employment or non-Federal prospective employment, *provided* that the matter will not have a special or distinct effect on the employee or employer other than as part of a class. For purposes of this paragraph, "disqualifying financial interest" arising from non-Federal employment does not include the interests of a special Government employee arising from the ownership of stock in his employer or prospective employer.

*Example 1:* A chemist employed by a major pharmaceutical company has been appointed to serve on an advisory committee established to develop recommendations for new standards for AIDS vaccine trials involving human subjects. Even though the chemist's employer is in the process of developing an

experimental AIDS vaccine and therefore will be affected by the new standards, the chemist may participate in formulating the advisory committee's recommendations. The chemist's employer will be affected by the new standards only as part of the class of all pharmaceutical companies and other research entities that are attempting to develop an AIDS vaccine.

*Example 2:* The National Cancer Institute (NCI) has established an advisory committee to evaluate a university's performance of an NCI grant to study the efficacy of a newly developed breast cancer drug. An employee of the university may not participate in the evaluation of the university's performance because it is not a matter of general applicability.

*Example 3:* An engineer whose principal employment is with a major Department of Defense (DOD) contractor is appointed to serve on an advisory committee established by DOD to develop concepts for the next generation of laser-guided missiles. The engineer's employer, as well as a number of other similar companies, has developed certain missile components for DOD in the past, and has the capability to work on aspects of the newer missile designs under consideration by the committee. The engineer owns \$20,000 worth of stock in his employer. Because the exemption for the employment interests of special Government employees serving on advisory committees does not extend to financial interests arising from the ownership of stock, the engineer may not participate in committee matters affecting his employer unless he receives an individual waiver under section 208(b)(1) or (b)(3), or determines whether the exemption for interests in securities at § 2640.202(b) applies.

(h) *Directors of Federal Reserve Banks.* A Director of a Federal Reserve Bank or a branch of a Federal Reserve Bank may participate in the following matters, even though they may be particular matters in which he, or any other person specified in section 208(a), has a disqualifying financial interest:

(1) Establishment of rates to be charged for all advances and discounts by Federal Reserve Banks;

(2) Consideration of monetary policy matters, regulations, statutes and proposed or pending legislation, and other matters of broad applicability intended to have uniform application to banks within the Reserve Bank district;

(3) Approval or ratification of extensions of credit, advances or discounts to a depository institution that has not been determined to be in a hazardous

financial condition by the President of the Reserve Bank; or

(4) Approval or ratification of extensions of credit, advances or discounts to a depository institution that has been determined to be in a hazardous financial condition by the President of the Reserve Bank, *provided that* the disqualifying financial interest arises from the ownership of stock in, or service as an officer, director, trustee, general partner or employee, of an entity other than the depository institution, or its parent holding company or subsidiary of such holding company.

(i) *Medical products.* A special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act (5 U.S.C. app.) may participate in Federal advisory committee matters concerning medical products if the disqualifying financial interest arises from:

(1) Employment with a hospital or other similar medical facility whose only interest in the medical product or device is purchase of it for use by, or sale to, its patients; or

(2) The use or prescription of medical products for patients.

(j) *Nonvoting members of standing technical advisory committees established by the Food and Drug Administration.* A special Government employee serving as a nonvoting representative member of an advisory committee established by the Food and Drug Administration pursuant to the requirements of the Federal Advisory Committee Act (5 U.S.C. app.) and appointed under a statutory authority requiring the appointment of representative members, may participate in any particular matter affecting a disqualifying financial interest in the class which the employee represents. Nonvoting representative members of Food and Drug Administration advisory committees are described in 21 CFR 14.80(b)(2), 14.84, 14.86, and 14.95(a).

*Example 1:* The FDA's Medical Devices Advisory Committee is established pursuant to 21 U.S.C. 360c(b), which requires that each panel of the Committee include one non-voting industry representative and one non-voting consumer representative. An industry representative on the Ophthalmic Devices Panel of this Committee has been appointed as a special Government employee, in ac-

cordance with the procedures described at 14 CFR 14.84. The special Government employee may participate in Panel discussions concerning the premarket approval application for a silicone posterior chamber intraocular lens manufactured by MedInc, even though she is employed by, and owns stock in, another company that manufactures a competing product. However, a consumer representative who serves as a special Government employee on the same Panel may not participate in Panel discussions if he owns \$30,000 worth of stock in MedInc unless he first obtains an individual waiver under 18 U.S.C. 208 (b)(1) or (b)(3).

(k) *Employees of the Tennessee Valley Authority.* An employee of the Tennessee Valley Authority (TVA) may participate in developing or approving rate schedules or similar matters affecting the general cost of electric power sold by TVA, if the disqualifying financial interest arises from use of such power by the employee or by any other person specified in section 208(a).

(l) *Exemption for financial interests of non-Federal government employers in the decennial census.* An employee of the Bureau of the Census at the United States Department of Commerce, who is also an employee of a State, local, or tribal government, may participate in the decennial census notwithstanding the disqualifying financial interests of the employee's non-Federal government employer in the census provided that the employee:

(1) Does not serve in a State, local, or tribal government position which is filled through public election;

(2) Was hired for a temporary position under authority of 13 U.S.C. 23; and

(3) Is serving in a Local Census Office or an Accuracy and Coverage Evaluation function position as an enumerator, crew leader, or field operations supervisor.

(m) *Official participation in nonprofit organizations.* An employee may participate in any particular matter where the disqualifying financial interest is that of a nonprofit organization in which the employee serves (or is seeking or has an arrangement to serve), solely in an official capacity, as an officer, director or trustee.

NOTE TO PARAGRAPH (m): Nothing in this paragraph shall be deemed independent authority for an agency to assign an employee

## § 2640.204

to serve in an official capacity with a particular nonprofit organization. Agencies will make such determinations based on an evaluation of their own statutory authorities and missions. Individual agency decisions to permit (or not permit) an employee to serve in an official capacity necessarily involve a range of legal, policy, and managerial considerations, and nothing in this paragraph is intended to interfere with an agency's discretion to assign official duties and limit such assignments as the agency deems appropriate.

[61 FR 66841, Dec. 18, 1996, as amended at 62 FR 23128, Apr. 29, 1997; 65 FR 16513, Mar. 29, 2000; 78 FR 14442, Mar. 6, 2013]

## § 2640.204 Prohibited financial interests.

None of the exemptions set forth in §§ 2640.201, 2640.202, or 2640.203 apply to any financial interest held or acquired by an employee, his spouse, or minor child in violation of a statute or agency supplemental regulation issued in accordance with 5 CFR 2635.105, or that is otherwise prohibited under 5 CFR 2635.403(b).

*Example 1 to § 2640.204:* The Office of the Comptroller of the Currency (OCC), in a regulation that supplements part 2635 of this chapter, prohibits certain employees from owning stock in commercial banks. If an OCC employee purchases stock valued at \$2,000 in contravention of the regulation, the exemption at § 2640.202(a) for interests arising from the ownership of no more than \$15,000 worth of publicly traded stock will not apply to the employee's participation in matters affecting the bank.

[61 FR 66841, Dec. 18, 1996, as amended at 67 FR 12446, Mar. 19, 2002]

## § 2640.205 Employee responsibility.

Prior to taking official action in a matter which an employee knows would affect his financial interest or the interest of another person specified in 18 U.S.C. 208(a), an employee must determine whether one of the exemptions in §§ 2640.201, 2640.202, or 2640.203 would permit his action notwithstanding the existence of the disqualifying interest. An employee who is unsure whether an exemption is applicable in a particular case, should consult an agency ethics official prior to taking action in a particular matter.

## 5 CFR Ch. XVI (1–1–16 Edition)

## § 2640.206 Existing agency exemptions.

An employee who, prior to January 17, 1997, acted in an official capacity in a particular matter in which he had a financial interest, will be deemed to have acted in accordance with applicable regulations if he acted in reliance on an exemption issued by his employing Government agency pursuant to 18 U.S.C. 208(b)(2), as in effect prior to November 30, 1989.

## Subpart C—Individual Waivers

## § 2640.301 Waivers issued pursuant to 18 U.S.C. 208(b)(1).

(a) *Requirements for issuing an individual waiver under 18 U.S.C. 208(b)(1).* Pursuant to 18 U.S.C. 208(b)(1), an agency may determine in an individual case that a disqualifying financial interest in a particular matter or matters is not so substantial as to be deemed likely to affect the integrity of the employee's services to the Government. Upon making that determination, the agency may then waive the employee's disqualification notwithstanding the financial interest, and permit the employee to participate in the particular matter. Waivers issued pursuant to section 208(b)(1) should comply with the following requirements:

(1) The disqualifying financial interest, and the nature and circumstances of the particular matter or matters, must be fully disclosed to the Government official responsible for appointing the employee to his position (or other Government official to whom authority to issue such a waiver for the employee has been delegated);

(2) The waiver must be issued in writing by the Government official responsible for appointing the employee to his position (or other Government official to whom the authority to issue such a waiver for the employee has been delegated);

(3) The waiver should describe the disqualifying financial interest, the particular matter or matters to which it applies, the employee's role in the matter or matters, and any limitations on the employee's ability to act in such matters;

(4) The waiver shall be based on a determination that the disqualifying financial interest is not so substantial as



to be deemed likely to affect the integrity of the employee's services to the Government. Statements concerning the employee's good character are not material to, nor a basis for making, such a decision;

(5) The waiver must be issued prior to the employee taking any action in the matter or matters; and

(6) The waiver may apply to both present and future financial interests, provided the interests are described with sufficient specificity.

NOTE TO PARAGRAPH (a): The disqualifying financial interest, the particular matter or matters to which the waiver applies, and the employee's role in such matters do not need to be described with any particular degree of specificity. For example, if a waiver were to apply to all matters which an employee would undertake as part of his official duties, the waiver document would not have to enumerate those duties. The information contained in the waiver, however, should provide a clear understanding of the nature and identity of the disqualifying financial interest, the matters to which the waiver will apply, and the employee's role in such matters.

(b) *Agency determination concerning substantiality of the disqualifying financial interest.* In determining whether a disqualifying financial interest is sufficiently substantial to be deemed likely to affect the integrity of the employee's services to the Government, the responsible official may consider the following factors:

(1) The type of interest that is creating the disqualification (e.g. stock, bonds, real estate, other securities, cash payment, job offer, or enhancement of a spouse's employment);

(2) The identity of the person whose financial interest is involved, and if the interest is not the employee's, the relationship of that person to the employee;

(3) The dollar value of the disqualifying financial interest, if it is known or can be estimated (e.g. the amount of cash payment which may be gained or lost, the salary of the job which will be gained or lost, the predictable change in either the market value of the stock or the actual or potential profit or loss or cost of the matter to the company issuing the stock, the change in the value of real estate or other securities);

(4) The value of the financial instrument or holding from which the disqualifying financial interest arises (e.g. the face value of the stock, bond, other security or real estate) and its value in relationship to the individual's assets. If the disqualifying financial interest is that of a general partner or organization specified in section 208, this information must be provided only to the extent that it is known by the employee; and

(5) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter.

(6) Other factors which may be taken into consideration include:

(i) The sensitivity of the matter;

(ii) The need for the employee's services in the particular matter; and

(iii) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that the integrity of the employee's services would be questioned by a reasonable person.

#### **§ 2640.302 Waivers issued pursuant to 18 U.S.C. 208(b)(3).**

(a) *Requirements for issuing an individual waiver under 18 U.S.C. 208(b)(3).* Pursuant to 18 U.S.C. 208(b)(3), an agency may determine in an individual case that the prohibition of 18 U.S.C. 208(a) should not apply to a special Government employee serving on, or an individual being considered for, appointment to an advisory committee established under the Federal Advisory Committee Act, notwithstanding the fact that the individual has one or more financial interests that would be affected by the activities of the advisory committee. The agency's determination must be based on a certification that the need for the employee's services outweighs the potential for a conflict of interest created by the financial interest involved. Waivers issued pursuant to 18 U.S.C. 208(b)(3) should comply with the following requirements:

(1) The advisory committee upon which the individual is serving, or will serve, is an advisory committee within the meaning of the Federal Advisory Committee Act, 5 U.S.C. app.;

(2) The waiver must be issued in writing by the Government official responsible for the individual's appointment (or other Government official to which authority to issue such waivers has been delegated) after the official reviews the financial disclosure report filed by the individual pursuant to the Ethics in Government Act of 1978;

(3) The waiver must include a certification that the need for the individual's services on the advisory committee outweighs the potential for a conflict of interest;

(4) The facts upon which the certification is based should be fully described in the waiver, including the nature of the financial interest, and the particular matter or matters to which the waiver applies;

(5) The waiver should describe any limitations on the individual's ability to act in the matter or matters;

(6) The waiver must be issued prior to the individual taking any action in the matter or matters; and

(7) The waiver may apply to both present and future financial interests of the individual, provided the interests are described with sufficient specificity.

(b) *Agency certification concerning need for individual's services.* In determining whether the need for an individual's services on an advisory committee outweighs the potential for a conflict of interest created by the disqualifying financial interest, the responsible official may consider the following factors:

(1) The type of interest that is creating the disqualification (e.g. stock, bonds, real estate, other securities, cash payment, job offer, or enhancement of a spouse's employment);

(2) The identity of the person whose financial interest is involved, and if the interest is not the individual's, the relationship of that person to the individual;

(3) The uniqueness of the individual's qualifications;

(4) The difficulty of locating a similarly qualified individual without a disqualifying financial interest to serve on the committee;

(5) The dollar value of the disqualifying financial interest, if it is known or can be estimated (e.g. the amount of

cash payment which may be gained or lost, the salary of the job which will be gained or lost, the predictable change in either the market value of the stock or the actual or potential profit or loss or cost of the matter to the company issuing the stock, the change in the value of real estate or other securities);

(6) The value of the financial instrument or holding from which the disqualifying financial interest arises (e.g. the face value of the stock, bond, other security or real estate) and its value in relationship to the individual's assets. If the disqualifying financial interest is that of a general partner or organization specified in section 208, this information must be provided only to the extent that it is known by the employee; and

(7) The extent to which the disqualifying financial interest will be affected individually or particularly by the actions of the advisory committee.

**§ 2640.303 Consultation and notification regarding waivers.**

When practicable, an official is required to consult formally or informally with the Office of Government Ethics prior to granting a waiver referred to in §§ 2640.301 and 2640.302. A copy of each such waiver is to be forwarded to the Director of the Office of Government Ethics.

**§ 2640.304 Public availability of agency waivers.**

(a) *Availability.* A copy of an agency waiver issued pursuant to 18 U.S.C. 208 (b)(1) or (b)(3) shall be made available upon request to the public by the issuing agency. Public release of waivers shall be in accordance with the procedures set forth in section 105 of the Ethics in Government Act of 1978, as amended. Those procedures are described in 5 CFR 2634.603.

(b) *Limitations on availability.* In making a waiver issued pursuant to 18 U.S.C. 208 (b)(1) or (b)(3) publicly available, an agency:

(1) May withhold from public disclosure any information contained in the waiver that would be exempt from disclosure pursuant to 5 U.S.C. 552; and

(2) Shall withhold from public disclosure information in a waiver issued

## Office of Government Ethics

## §2641.101

pursuant to 18 U.S.C. 208(b)(3) concerning an individual's financial interest which is more extensive than that required to be disclosed by the individual in his financial disclosure report under the Ethics in Government Act of 1978, as amended, or which is otherwise subject to a prohibition on public disclosure under law.

### PART 2641—POST-EMPLOYMENT CONFLICT OF INTEREST RESTRICTIONS

#### Subpart A—General Provisions

Sec.

- 2641.101 Purpose.
- 2641.102 Applicability.
- 2641.103 Enforcement and penalties.
- 2641.104 Definitions.
- 2641.105 Advice.
- 2641.106 Applicability of certain provisions to Vice President.

#### Subpart B—Prohibitions

- 2641.201 Permanent restriction on any former employee's representations to United States concerning particular matter in which the employee participated personally and substantially.
- 2641.202 Two-year restriction on any former employee's representations to United States concerning particular matter for which the employee had official responsibility.
- 2641.203 One-year restriction on any former employee's representations, aid, or advice concerning ongoing trade or treaty negotiation.
- 2641.204 One-year restriction on any former senior employee's representations to former agency concerning any matter, regardless of prior involvement.
- 2641.205 Two-year restriction on any former very senior employee's representations to former agency or certain officials concerning any matter, regardless of prior involvement.
- 2641.206 One-year restriction on any former senior or very senior employee's representations on behalf of, or aid or advice to, foreign entity.
- 2641.207 One-year restriction on any former private sector assignee under the Information Technology Exchange Program representing, aiding, counseling or assisting in representing in connection with any contract with former agency.

#### Subpart C—Exceptions, Waivers and Separate Components

- 2641.301 Statutory exceptions and waivers.

2641.302 Separate agency components.

APPENDIX A TO PART 2641—POSITIONS WAIVED  
FROM 18 U.S.C. 207(c) AND (f)

APPENDIX B TO PART 2641—AGENCY COMPONENTS FOR PURPOSES OF 18 U.S.C. 207(c)

AUTHORITY: 5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. 207; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

SOURCE: 73 FR 36186, June 25, 2008, unless otherwise noted.

#### Subpart A—General Provisions

##### § 2641.101 Purpose.

18 U.S.C. 207 prohibits certain acts by former employees (including current employees who formerly served in "senior" or "very senior" employee positions) which involve, or may appear to involve, the unfair use of prior Government employment. None of the restrictions of section 207 prohibits any former employee, regardless of Government rank or position, from accepting employment with any particular private or public employer. Rather, section 207 prohibits a former employee from providing certain services to or on behalf of non-Federal employers or other persons, whether or not done for compensation. These restrictions are personal to the employee and are not imputed to others. (See, however, the note following §2641.103 concerning 18 U.S.C. 2.)

(a) This part 2641 explains the scope and content of 18 U.S.C. 207 as it applies to former employees of the executive branch or of certain independent agencies (including current employees who formerly served in "senior" or "very senior" employee positions). Although certain restrictions in section 207 apply to former employees of the District of Columbia, Members and elected officials of the Congress and certain legislative staff, and employees of independent agencies in the legislative and judicial branches, this part is not intended to provide guidance to those individuals.

(b) Part 2641 does not address post-employment restrictions that may be contained in laws or authorities other than 18 U.S.C. 207. These restrictions include those in 18 U.S.C. 203 and 41 U.S.C. 423(d).

**§ 2641.102 Applicability.**

Since its enactment in 1962, 18 U.S.C. 207 has been amended several times. As a consequence of these amendments, former executive branch employees are subject to varying post-employment restrictions depending upon the date they terminated Government service (or service in a “senior” or “very senior” employee position).

(a) *Employees terminating on or after January 1, 1991.* Former employees who terminated or employees terminating Government service (or service in a “senior” or “very senior” employee position) on or after January 1, 1991, are subject to the provisions of 18 U.S.C. 207 as amended by the Ethics Reform Act of 1989, title I, Public Law 101–194, 103 Stat. 1716 (with amendments enacted by Act of May 4, 1990, Pub. L. 101–280, 104 Stat. 149) and by subsequent amendments. This part 2641 provides guidance concerning section 207 to these former employees.

(b) *Employees terminating between July 1, 1979 and December 31, 1990.* Former employees who terminated service between July 1, 1979, and December 31, 1990, are subject to the provisions of section 207 as amended by the Ethics in Government Act of 1978, title V, Public Law 95–521, 92 Stat. 1864 (with amendments enacted by Act of June 22, 1979, Pub. L. 96–28, 93 Stat. 76). Regulations providing guidance concerning 18 U.S.C. 207 to these employees were last published in the 2008 edition of title 5 of the Code of Federal Regulations, revised as of January 1, 2008.

(c) *Employees terminating prior to July 1, 1979.* Former employees who terminated service prior to July 1, 1979, are subject to the provisions of 18 U.S.C. 207 as enacted in 1962 by the Act of October 23, 1962, Public Law 87–849, 76 Stat. 1123.

NOTE TO § 2641.102: The provisions of this part 2641 reflect amendments to 18 U.S.C. 207 enacted subsequent to the Ethics Reform Act of 1989 and before July 25, 2008. An employee who terminated Government service (or service in a “senior” or “very senior” employee position) between January 1, 1991, and July 25, 2008 may have become subject, upon termination, to a version of the statute that existed prior to the effective date of one or more of those amendments. Those amendments concerned: (1) changes, effective in 1990, 1996, and 2004 concerning the rate of

basic pay triggering “senior employee” status for purposes of section 207(c); (2) the reinstatement and subsequent amendment of the Presidential waiver authority in section 207(k); (3) the length of the restriction set forth in section 207(f) as applied to a former United States Trade Representative or Deputy United States Trade Representative; (4) the addition of section 207(j)(7), an exception to section 207(c) and (d); (5) a change to section 207(j)(2)(B), an exception to section 207(c) and (d); (6) the addition of assignees under the Information Technology Exchange Program to the categories of “senior employee” for purposes of section 207(c); (7) the addition of section 207(l), applicable to former private sector assignees under the Information Technology Exchange Program; (8) a change to the length of the restriction set forth in section 207(d); and (9) the addition of a cross-reference in section 207(j)(1)(B) to a revised exception in the Indian Self-Determination and Education Assistance Act.

**§ 2641.103 Enforcement and penalties.**

(a) *Enforcement.* Criminal and civil enforcement of the provisions of 18 U.S.C. 207 is the responsibility of the Department of Justice. An agency is required to report to the Attorney General any information, complaints or allegations of possible criminal conduct in violation of title 18 of the United States Code, including possible violations of section 207 by former officers and employees. See 28 U.S.C. 535. When a possible violation of section 207 is referred to the Attorney General, the referring agency shall concurrently notify the Director of the Office of Government Ethics of the referral in accordance with 5 CFR 2638.603.

(b) *Penalties and injunctions.* 18 U.S.C. 216 provides for the imposition of one or more of the following penalties and injunctions for a violation of section 207:

(1) *Criminal penalties.* 18 U.S.C. 216(a) sets forth the maximum imprisonment terms for felony and misdemeanor violations of section 207. Section 216(a) also provides for the imposition of criminal fines for violations of section 207. For the amount of the criminal fines that may be imposed, see 18 U.S.C. 3571.

(2) *Civil penalties.* 18 U.S.C. 216(b) authorizes the Attorney General to take civil actions to impose civil penalties for violations of section 207 and sets forth the amounts of the civil fines.

(3) *Injunctive relief.* 18 U.S.C. 216(c) authorizes the Attorney General to seek an order from a United States District Court to prohibit a person from engaging in conduct which violates section 207.

(c) *Other relief.* In addition to any other remedies provided by law, the United States may, pursuant to 18 U.S.C. 218, void or rescind contracts, transactions, and other obligations of the United States in the event of a final conviction pursuant to section 207, and recover the amount expended or the thing transferred or its reasonable value.

NOTE TO §2641.103: A person or entity who aids, abets, counsels, commands, induces, or procures commission of a violation of section 207 is punishable as a principal under 18 U.S.C. 2.

#### §2641.104 Definitions.

For purposes of this part:

*Agency* means any department, independent establishment, commission, administration, authority, board or bureau of the United States or Government corporation. The term includes any independent agency not in the legislative or judicial branches.

*Agency ethics official* means the designated agency ethics official (DAEO) or the alternate DAEO, appointed in accordance with 5 CFR 2638.202(b), and any deputy ethics official described in 5 CFR 2638.204.

*Department* means one of the executive departments listed in 5 U.S.C. 101.

*Designated agency ethics official* (DAEO) means the official designated under 5 CFR 2638.201 to coordinate and manage an agency's ethics program.

*Employee* means, for purposes of determining the individuals subject to 18 U.S.C. 207, any officer or employee of the executive branch or any independent agency that is not a part of the legislative or judicial branches. The term does not include the President or the Vice President, an enlisted member of the Armed Forces, or an officer or employee of the District of Columbia. The term includes an individual appointed as an employee or detailed to the Federal Government under the Intergovernmental Personnel Act (5 U.S.C. 3371-3376) or specifically subject to section 207 under the terms

of another statute. It encompasses senior employees, very senior employees, special Government employees, and employees serving without compensation. (This term is redefined elsewhere in this part, as necessary, when the term is used for other purposes.)

*Executive branch* includes an executive department as defined in 5 U.S.C. 101, a Government corporation, an independent establishment (other than the Government Accountability Office), the Postal Service, the Postal Regulatory Commission, and also includes any other entity or administrative unit in the executive branch.

*Former employee* means an individual who has completed a period of service as an employee. Unless otherwise indicated, the term encompasses a former senior employee and a former very senior employee. An individual becomes a former employee at the termination of Government service, whereas an individual becomes a former senior employee or a former very senior employee at the termination of service in a senior or very senior employee position.

*Example 1 to the definition of former employee:* An individual served as an employee of the Agency for International Development, an agency within the executive branch. Since he was, therefore, an "employee" as that term is defined in this section by virtue of having served in the executive branch, he became a "former employee" when he terminated Government service to pursue his hobbies.

*Example 2 to the definition of former employee:* An individual served as an employee of the Tennessee Valley Authority (TVA). Since the TVA is a corporation owned or controlled by the Government of the United States, she served as an employee in the "executive branch" as that term is defined in this section. She became a "former employee," therefore, when she terminated Government service to do some traveling.

*Example 3 to the definition of former employee:* An individual terminated a GS-14 position in the executive branch to accept a position in the legislative branch. He did not become a "former employee" when he terminated service in the executive branch since he did not terminate "Government service" as that term is defined in this section.

*Example 4 to the definition of former employee:* An individual is appointed by the President to serve as a special Government employee on the Oncological Drug Advisory Committee at the Department of Health and

Human Services. The special Government employee meets with the committee five days per year. She does not terminate Government service at the end of each meeting of the committee and therefore does not at that time become a “former employee.” She becomes a “former employee” when her appointment terminates, provided that she is not reappointed without break in service to the same or another Federal Government position.

*Example 5 to the definition of former employee:* An individual is a Major in the U.S. Army Reserve. The Major earns points toward retirement by participating in weekend drills and performing active duty for training for two weeks each year. The Major is not a special Government employee when he performs weekend drills, but is considered to be one while on active duty for training. The Major is considered to be a “former employee” when he terminates each period of active duty for training.

*Example 6 to the definition of former employee:* A foreign service officer served as a “senior employee” of the Department of State. After retiring, and with no break in service, he accepted a civil service appointment on a temporary basis, at the GS-15 level. Since he did not terminate Government service, he did not become a “former employee” when he retired from the foreign service. He did, however, become a “former senior employee.”

*Former senior employee* is an individual who terminates service in a senior employee position (without successive Government service in another senior position).

*Former very senior employee* is an individual who terminates service in a very senior employee position (without successive Government service in another very senior employee position).

*Government corporation* means, for purposes of determining the individuals subject to 18 U.S.C. 207, a corporation that is owned or controlled by the Government of the United States. For purposes of identifying or determining individuals with whom post-employment contact is restricted, matters to which the United States is a party or has a direct and substantial interest, decisions which a former senior or very senior employee cannot seek to influence on behalf of a foreign entity, and whether a former employee is acting on behalf of the United States, it means a corporation in which the United States has a proprietary interest as distinguished from a custodial or incidental interest as shown by the functions, fi-

nancing, control, and management of the corporation.

*Government service* means a period of time during which an individual is employed by the Federal Government without a break in service. As applied to a special Government employee (SGE), Government service refers to the period of time covered by the individual’s appointment or appointments (or other act evidencing employment with the Government), regardless of any interval or intervals between days actually served. *See* example 4 to the definition of former employee in this section. In the case of Reserve officers of the Armed Forces or officers of the National Guard of the United States who are not otherwise employees of the United States, Government service shall be considered to end upon the termination of a period of active duty or active duty for training during which they served as SGEs. *See* example 5 to the definition of former employee in this section.

*He, his, and him* include she, hers, and her, and vice versa.

*Judicial branch* means the Supreme Court of the United States; the United States courts of appeals; the United States district courts; the Court of International Trade; the United States bankruptcy courts; any court created pursuant to Article I of the United States Constitution, including the United States Court of Appeals for the Armed Forces, the United States Claims Court, and the United States Tax Court, but not including a court of a territory or possession of the United States; the Federal Judicial Center; and any other agency, office, or entity in the judicial branch.

*Legislative branch* means the Congress; it also means the Office of the Architect of the Capitol, the United States Botanic Garden, the Government Accountability Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, the United States Capitol Police, and any other agency, entity, office, or commission established in the legislative branch.

*Person* includes an individual, corporation, company, association, firm,

partnership, society, joint stock company, or any other organization, institution, or entity, including any officer, employee, or agent of such person or entity. Unless otherwise indicated, the term is all-inclusive and applies to commercial ventures and nonprofit organizations as well as to foreign, State and local governments. The term includes the “United States” as that term is defined in §2641.301(a)(1).

*Senior employee* means an employee, other than a very senior employee, who is:

- (1) Employed in a position for which the rate of pay is specified in or fixed according to 5 U.S.C. 5311–5318 (the Executive Schedule);
- (2) Employed in a position for which the employee is paid at a rate of basic pay which is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule; or, for a period of two years following November 24, 2003, was employed on November 23, 2003 in a position for which the rate of basic pay was equal to or greater than the rate of basic pay payable for level 5 of the Senior Executive Service; for purposes of this paragraph, “rate of basic pay” does not include locality-based adjustments or additional pay such as bonuses, awards and various allowances;
- (3) Appointed by the President to a position under 3 U.S.C. 105(a)(2)(B);
- (4) Appointed by the Vice President to a position under 3 U.S.C. 106(a)(1)(B);
- (5) An active duty commissioned officer of the uniformed services serving in a position for which the pay grade (as specified in 37 U.S.C. 201) is pay grade O-7 or above; or
- (6) Assigned from a private sector organization under chapter 37 of 5 U.S.C. (Information Technology Exchange Program).

*Example 1 to the definition of senior employee:* A former administrative law judge serves on a commission created within the executive branch to adjudicate certain claims arising from a recent military operation. The position is uncompensated but the judge receives travel expenses. The judge is not employed in a position for which the rate of pay is specified in or fixed according to the Executive Schedule, is not serving in a position to which he was appointed by the President or Vice President under 3 U.S.C. 105(a)(2)(B) or 106(a)(1)(B), and is not em-

ployed in a position for which his rate of basic pay is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule. He is not a senior employee.

*Example 2 to the definition of senior employee:* A doctor is hired to fill a “senior-level” position and is initially compensated pursuant to 5 U.S.C. 5376 at a rate of basic pay slightly less than 86.5 percent of the rate of basic pay payable for level II of the Executive Schedule. If both the annual pay adjustment provided for in 5 CFR 534.504 and the periodic pay adjustment authorized in 5 CFR 534.503 result in a rate of basic pay equal to or above 86.5 percent of the rate of basic pay payable for level II of the Executive Schedule, the doctor will become a senior employee.

*Example 3 to the definition of senior employee:* A criminal investigator in the Office of the Inspector General at the Department of Housing and Urban Development is a GS-15 employee but also receives Law Enforcement Availability Pay (LEAP), pursuant to 5 U.S.C. 5545a. Even if the sum of the employee’s LEAP payment plus the employee’s basic pay for GS-15 equaled 86.5 percent of the rate of basic pay for level II of the Executive Schedule, LEAP is not considered part of an employee’s “rate of basic pay” for purposes of section 207(c), and therefore the employee would not be a “senior employee.”

*Special Government employee* means an officer or employee of the executive branch or an independent agency, as specified in 18 U.S.C. 202(a). A special Government employee is retained, designated, appointed, or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for a period not to exceed 130 days during any period of 365 consecutive days.

*State* means one of the fifty States of the United States and the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

*Very senior employee* means an employee who is:

- (1) Employed in a position which is either listed in 5 U.S.C. 5312 or for which the rate of pay is equal to the rate of pay payable for level I of the Executive Schedule;
- (2) Employed in a position in the Executive Office of the President which is either listed in 5 U.S.C. 5313 or for which the rate of pay is equal to the rate of pay payable for level II of the Executive Schedule;

## § 2641.105

(3) Appointed by the President to a position under 3 U.S.C. 105(a)(2)(A); or

(4) Appointed by the Vice President to a position under 3 U.S.C. 106(a)(1)(A).

### § 2641.105 Advice.

(a) *Agency ethics officials.* Current or former employees or others who have questions about 18 U.S.C. 207 or about this part 2641 should seek advice from a designated agency ethics official or another agency ethics official. The agency in which an individual formerly served has the primary responsibility to provide oral or written advice concerning a former employee's post-employment activities. An agency ethics official, in turn, may consult with other agencies, such as those before whom a post-employment communication or appearance is contemplated, and with the Office of Government Ethics.

(b) *Office of Government Ethics.* The Office of Government Ethics (OGE) will provide advice to agency ethics officials and others concerning 18 U.S.C. 207 and this part 2641. OGE may provide advice orally or through issuance of a written advisory opinion and shall, as appropriate, consult with the agency or agencies concerned and with the Department of Justice.

(c) *Effect of advice.* Reliance on the oral or written advice of an agency ethics official or the OGE cannot ensure that a former employee will not be prosecuted for a violation of 18 U.S.C. 207. However, good faith reliance on such advice is a factor that may be taken into account by the Department of Justice (DOJ) in the selection of cases for prosecution. In the case in which OGE issues a formal advisory opinion in accordance with subpart C of 5 CFR part 2638, the DOJ will not prosecute an individual who acted in good faith in accordance with that opinion. *See* 5 CFR 2638.309.

(d) *Contacts to seek advice.* A former employee will not be deemed to act on behalf of any other person in violation of 18 U.S.C. 207 when he contacts an agency ethics official or other employee of the United States for the purpose of seeking guidance concerning the applicability or meaning of section 207 as applied to his own activities.

## 5 CFR Ch. XVI (1–1–16 Edition)

(e) *No personal attorney-client privilege.* A current or former employee who discloses information to an agency ethics official, to a Government attorney, or to an employee of the Office of Government Ethics does not personally enjoy an attorney-client privilege with respect to such communications.

### § 2641.106 Applicability of certain provisions to Vice President.

Subsections 207(d) (relating to restrictions on very senior personnel) and 207(f) (restrictions with regard to foreign entities) of title 18, United States Code, apply to a Vice President, to the same extent as they apply to employees and former employees covered by those provisions. *See* §§ 2641.205 and 2641.206. There are no other restrictions in 18 U.S.C. 207 applicable to a Vice President.

## Subpart B—Prohibitions

### § 2641.201 Permanent restriction on any former employee's representations to United States concerning particular matter in which the employee participated personally and substantially.

(a) *Basic prohibition of 18 U.S.C. 207(a)(1).* No former employee shall knowingly, with the intent to influence, make any communication to or appearance before an employee of the United States on behalf of any other person in connection with a particular matter involving a specific party or parties, in which he participated personally and substantially as an employee, and in which the United States is a party or has a direct and substantial interest.

(b) *Exceptions and waivers.* The prohibition of 18 U.S.C. 207(a)(1) does not apply to a former employee who is:

(1) Acting on behalf of the United States. *See* § 2641.301(a).

(2) Acting as an elected State or local government official. *See* § 2641.301(b).

(3) Communicating scientific or technological information pursuant to procedures or certification. *See* § 2641.301(e).

(4) Testifying under oath. *See* § 2641.301(f). (Note that this exception



from §2641.201 is generally not available for expert testimony. *See* §2641.301(f)(2).)

(5) Acting on behalf of an international organization pursuant to a waiver. *See* §2641.301(h).

(6) Acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver. *See* §2641.301(i).

(c) *Commencement and length of restriction.* 18 U.S.C. 207(a)(1) is a permanent restriction that commences upon an employee's termination from Government service. The restriction lasts for the life of the particular matter involving specific parties in which the employee participated personally and substantially.

(d) *Communication or appearance—(1) Communication.* A former employee makes a communication when he imparts or transmits information of any kind, including facts, opinions, ideas, questions or direction, to an employee of the United States, whether orally, in written correspondence, by electronic media, or by any other means. This includes only those communications with respect to which the former employee intends that the information conveyed will be attributed to himself, although it is not necessary that any employee of the United States actually recognize the former employee as the source of the information.

(2) *Appearance.* A former employee makes an appearance when he is physically present before an employee of the United States, in either a formal or informal setting. Although an appearance also may be accompanied by certain communications, an appearance need not involve any communication by the former employee.

(3) *Behind-the-scenes assistance.* Nothing in this section prohibits a former employee from providing assistance to another person, provided that the assistance does not involve a communication to or an appearance before an employee of the United States.

*Example 1 to paragraph (d):* A former employee of the Federal Bureau of Investigation makes a brief telephone call to a colleague in her former office concerning an ongoing investigation. She has made a communication. If she personally attends an informal meeting with agency personnel con-

cerning the matter, she will have made an appearance.

*Example 2 to paragraph (d):* A former employee of the National Endowment for the Humanities (NEH) accompanies other representatives of an NEH grantee to a meeting with the agency. Even if the former employee does not say anything at the meeting, he has made an appearance (although that appearance may or may not have been made with the intent to influence, depending on the circumstances).

*Example 3 to paragraph (d):* A Government employee administered a particular contract for agricultural research with Q Company. Upon termination of her Government employment, she is hired by Q Company. She works on the matter covered by the contract, but has no direct contact with the Government. At the request of a company vice president, she prepares a paper describing the persons at her former agency who should be contacted and what should be said to them in an effort to increase the scope of funding of the contract and to resolve favorably a dispute over a contract clause. She may do so.

*Example 4 to paragraph (d):* A former employee of the National Institutes of Health (NIH) prepares an application for an NIH research grant on behalf of her university employer. The application is signed and submitted by another university officer, but it lists the former employee as the principal investigator who will be responsible for the substantive work under the grant. She has not made a communication. She also may sign an assurance to the agency that she will be personally responsible for the direction and conduct of the research under the grant, pursuant to §2641.201(e)(2)(iv). Moreover, she may personally communicate scientific or technological information to NIH concerning the application, provided that she does so under circumstances indicating no intent to influence the Government pursuant to §2641.201(e)(2) or she makes the communication in accordance with the exception for scientific or technological information in §2641.301(e).

*Example 5 to paragraph (d):* A former employee established a small government relations firm with a highly specialized practice in certain environmental compliance issues. She prepared a report for one of her clients, which she knew would be presented to her former agency by the client. The report is not signed by the former employee, but the document does bear the name of her firm. The former employee expects that it is commonly known throughout the industry and the agency that she is the author of the report. If the report were submitted to the agency, the former employee would be making a communication and not merely confining herself to behind-the-scenes assistance, because the circumstances indicate

that she intended the information to be attributed to herself.

(e) *With the intent to influence*—(1) *Basic concept.* The prohibition applies only to communications or appearances made by a former Government employee with the intent to influence the United States. A communication or appearance is made with the intent to influence when made for the purpose of:

(i) Seeking a Government ruling, benefit, approval, or other discretionary Government action; or

(ii) Affecting Government action in connection with an issue or aspect of a matter which involves an appreciable element of actual or potential dispute or controversy.

*Example 1 to paragraph (e)(1):* A former employee of the Administration on Children and Families (ACF) signs a grant application and submits it to ACF on behalf of a non-profit organization for which she now works. She has made a communication with the intent to influence an employee of the United States because her communication was made for the purpose of seeking a Government benefit.

*Example 2 to paragraph (e)(1):* A former Government employee calls an agency official to complain about the auditing methods being used by the agency in connection with an audit of a Government contractor for which the former employee serves as a consultant. The former employee has made a communication with the intent to influence because his call was made for the purpose of seeking Government action in connection with an issue involving an appreciable element of dispute.

(2) *Intent to influence not present.* Certain communications to and appearances before employees of the United States are not made with the intent to influence, within the meaning of paragraph (e)(1) of this section, including, but not limited to, communications and appearances made solely for the purpose of:

(i) Making a routine request not involving a potential controversy, such as a request for publicly available documents or an inquiry as to the status of a matter;

(ii) Making factual statements or asking factual questions in a context that involves neither an appreciable element of dispute nor an effort to seek discretionary Government action, such

as conveying factual information regarding matters that are not potentially controversial during the regular course of performing a contract;

(iii) Signing and filing the tax return of another person as preparer;

(iv) Signing an assurance that one will be responsible as principal investigator for the direction and conduct of research under a Federal grant (*see example 4 to paragraph (d) of this section*);

(v) Filing a Securities and Exchange Commission (SEC) Form 10-K or similar disclosure forms required by the SEC;

(vi) Making a communication, at the initiation of the Government, concerning work performed or to be performed under a Government contract or grant, during a routine Government site visit to premises owned or occupied by a person other than the United States where the work is performed or would be performed, in the ordinary course of evaluation, administration, or performance of an actual or proposed contract or grant; or

(vii) Purely social contacts (*see example 4 to paragraph (f) of this section*).

*Example 1 to paragraph (e)(2):* A former Government employee calls an agency to ask for the date of a scheduled public hearing on her client's license application. This is a routine request not involving a potential controversy and is not made with the intent to influence.

*Example 2 to paragraph (e)(2):* In the previous example, the agency's hearing calendar is quite full, as the agency has a significant backlog of license applications. The former employee calls a former colleague at the agency to ask if the hearing date for her client could be moved up on the schedule, so that her client can move forward with its business plans more quickly. This is a communication made with the intent to influence.

*Example 3 to paragraph (e)(2):* A former employee of the Department of Defense (DOD) now works for a firm that has a DOD contract to produce an operator's manual for a radar device used by DOD. In the course of developing a chapter about certain technical features of the device, the former employee asks a DOD official certain factual questions about the device and its properties. The discussion does not concern any matter that is known to involve a potential controversy between the agency and the contractor. The

former employee has not made a communication with the intent to influence.

*Example 4 to paragraph (e)(2):* A former medical officer of the Food and Drug Administration (FDA) sends a letter to the agency in which he sets out certain data from safety and efficacy tests on a new drug for which his employer, ABC Drug Co., is seeking FDA approval. Even if the letter is confined to arguably “factual” matters, such as synopses of data from clinical trials, the communication is made for the purpose of obtaining a discretionary Government action, i.e., approval of a new drug. Therefore, this is a communication made with the intent to influence.

*Example 5 to paragraph (e)(2):* A former Government employee now works for a management consulting firm, which has a Government contract to produce a study on the efficiency of certain agency operations. Among other things, the contract calls for the contractor to develop a range of alternative options for potential restructuring of certain internal Government procedures. The former employee would like to meet with agency representatives to present a tentative list of options developed by the contractor. She may not do so. There is a potential for controversy between the Government and the contractor concerning the extent and adequacy of any options presented, and, moreover, the contractor may have its own interest in emphasizing certain options as opposed to others because some options may be more difficult and expensive for the contractor to develop fully than others.

*Example 6 to paragraph (e)(2):* A former employee of the Internal Revenue Service (IRS) prepares his client’s tax return, signs it as preparer, and mails it to the IRS. He has not made a communication with the intent to influence. In the event that any controversy should arise concerning the return, the former employee may not represent the client in the proceeding, although he may answer direct factual questions about the records he used to compile figures for the return, provided that he does not argue any theories or positions to justify the use of one figure rather than another.

*Example 7 to paragraph (e)(2):* An agency official visits the premises of a prospective contractor to evaluate the testing procedure being proposed by the contractor for a research contract on which it has bid. A former employee of the agency, now employed by the contractor, is the person most familiar with the technical aspects of the proposed testing procedure. The agency official asks the former employee about certain technical features of the equipment used in connection with the testing procedure. The former employee may provide factual information that is responsive to the questions posed by the agency official, as such information is requested by the Government

under circumstances for its convenience in reviewing the bid. However, the former employee may not argue for the appropriateness of the proposed testing procedure or otherwise advocate any position on behalf of the contractor.

(3) *Change in circumstances.* If, at any time during the course of a communication or appearance otherwise permissible under paragraph (e)(2) of this section, it becomes apparent that circumstances have changed which would indicate that any further communication or appearance would be made with the intent to influence, the former employee must refrain from such further communication or appearance.

*Example 1 to paragraph (e)(3):* A former Government employee accompanies another employee of a contractor to a routine meeting with agency officials to deliver technical data called for under a Government contract. During the course of the meeting, an unexpected dispute arises concerning certain terms of the contract. The former employee may not participate in any discussion of this issue. Moreover, if the circumstances clearly indicate that even her continued presence during this discussion would be an appearance made with the intent to influence, she should excuse herself from the meeting.

(4) *Mere physical presence intended to influence.* Under some circumstances, a former employee’s mere physical presence, without any communication by the employee concerning any material issue or otherwise, may constitute an appearance with the intent to influence an employee of the United States. Relevant considerations include such factors as whether:

(i) The former employee has been given actual or apparent authority to make any decisions, commitments, or substantive arguments in the course of the appearance;

(ii) The Government employee before whom the appearance is made has substantive responsibility for the matter and does not simply perform ministerial functions, such as the acceptance of paperwork;

(iii) The former employee’s presence is relatively prominent;

(iv) The former employee is paid for making the appearance;

(v) It is anticipated that others present at the meeting will make reference to the views or past or present work of the former employee;

(vi) Circumstances do not indicate that the former employee is present merely for informational purposes, for example, merely to listen and record information for later use;

(vii) The former employee has entered a formal appearance in connection with a legal proceeding at which he is present; and

(viii) The appearance is before former subordinates or others in the same chain of command as the former employee.

*Example 1 to paragraph (e)(4):* A former Regional Administrator of the Occupational Safety and Health Administration (OSHA) becomes a consultant for a company being investigated for possible enforcement action by the regional OSHA office. She is hired by the company to coordinate and guide its response to the OSHA investigation. She accompanies company officers to an informal meeting with OSHA, which is held for the purpose of airing the company's explanation of certain findings in an adverse inspection report. The former employee is introduced at the meeting as the company's compliance and governmental affairs adviser, but she does not make any statements during the meeting concerning the investigation. She is paid a fee for attending this meeting. She has made an appearance with the intent to influence.

*Example 2 to paragraph (e)(4):* A former employee of an agency now works for a manufacturer that seeks agency approval for a new product. The agency convenes a public advisory committee meeting for the purpose of receiving expert advice concerning the product. Representatives of the manufacturer will make an extended presentation of the data supporting the application for approval, and a special table has been reserved for them in the meeting room for this purpose. The former employee does not participate in the manufacturer's presentation to the advisory committee and does not even sit in the section designated for the manufacturer. Rather, he sits in the back of the room in a large area reserved for the public and the media. The manufacturer's speakers make no reference to the involvement or views of the former employee with respect to the matter. Even though the former employee may be recognized in the audience by certain agency employees, he has not made an appearance with the intent to influence because his presence is relatively inconspicuous and there is little to identify him with the manufacturer or the advocacy of its representatives at the meeting.

(f) *To or before an employee of the United States—(1) Employee of the United States.* For purposes of this paragraph,

an “employee of the United States” means the President, the Vice President, and any current Federal employee (including an individual appointed as an employee or detailed to the Federal Government under the Intergovernmental Personnel Act (5 U.S.C. 3371–3376)) who is detailed to or employed by any:

- (i) Agency (including a Government corporation);
- (ii) Independent agency in the executive, legislative, or judicial branch;
- (iii) Federal court; or
- (iv) Court-martial.

(2) *To or before.* Except as provided in paragraph (f)(3) of this section, a communication “to” or appearance “before” an employee of the United States is one:

(i) Directed to and received by an entity specified in paragraphs (f)(1)(i) through (f)(1)(iv) of this section even though not addressed to a particular employee, e.g., as when a former employee mails correspondence to an agency but not to any named employee; or

(ii) Directed to and received by an employee in his capacity as an employee of an entity specified in paragraphs (f)(1)(i) through (f)(1)(iv) of this section, e.g., as when a former employee directs remarks to an employee representing the United States as a party or intervenor in a Federal or non-Federal judicial proceeding. A former employee does not direct his communication or appearance to a bystander who merely happens to overhear the communication or witness the appearance.

(3) *Public commentary.* (i) A former employee who addresses a public gathering or a conference, seminar, or similar forum as a speaker or panel participant will not be considered to be making a prohibited communication or appearance if the forum:

(A) Is not sponsored or co-sponsored by an entity specified in paragraphs (f)(1)(i) through (f)(1)(iv) of this section;

(B) Is attended by a large number of people; and

(C) A significant proportion of those attending are not employees of the United States.

(ii) In the circumstances described in paragraph (f)(3)(i) of this section, a former employee may engage in exchanges with any other speaker or with any member of the audience.

(iii) A former employee also may permit the broadcast or publication of a commentary provided that it is broadcast or appears in a newspaper, periodical, or similar widely available publication.

*Example 1 to paragraph (f):* A Federal Trade Commission (FTC) employee participated in the FTC's decision to initiate an enforcement proceeding against a particular company. After terminating Government service, the former employee is hired by the company to lobby key Members of Congress concerning the necessity of the proceeding. He may contact Members of Congress or their staff since a communication to or appearance before such persons is not made to or before an "employee of the United States" as that term is defined in paragraph (f)(1) of this section.

*Example 2 to paragraph (f):* In the previous example, the former FTC employee arranges to meet with a Congressional staff member to discuss the necessity of the proceeding. A current FTC employee is invited by the staff member to attend and is authorized by the FTC to do so in order to present the agency's views. The former employee may not argue his new employer's position at that meeting since his arguments would unavoidably be directed to the FTC employee in his capacity as an employee of the FTC.

*Example 3 to paragraph (f):* The Department of State granted a waiver pursuant to 18 U.S.C. 208(b)(1) to permit one of its employees to serve in his official capacity on the Board of Directors of a private association. The employee participates in a Board meeting to discuss what position the association should take concerning the award of a recent contract by the Department of Energy (DOE). When a former DOE employee addresses the Board to argue that the association should object to the award of the contract, she is directing her communication to a Department of State employee in his capacity as an employee of the Department of State.

*Example 4 to paragraph (f):* A Federal Communications Commission (FCC) employee participated in a proceeding to review the renewal of a license for a television station. After terminating Government service, he is hired by the company that holds the license. At a cocktail party, the former employee meets his former supervisor who is still employed by the FCC and begins to discuss the specifics of the license renewal case with him. The former employee is directing his communication to an FCC employee in his

capacity as an employee of the FCC. Moreover, as the conversation concerns the license renewal matter, it is not a purely social contact and satisfies the element of the intent to influence the Government within the meaning of paragraph (e) of this section.

*Example 5 to paragraph (f):* A Federal Trade Commission economist participated in her agency's review of a proposed merger between two companies. After terminating Government service, she goes to work for a trade association that is interested in the proposed merger. She would like to speak about the proposed merger at a conference sponsored by the trade association. The conference is attended by 100 individuals, 50 of whom are employees of entities specified in paragraphs (f)(1)(i) through (f)(1)(iv) of this section. The former employee may speak at the conference and may engage in a discussion of the merits of the proposed merger in response to a question posed by a Department of Justice employee in attendance.

*Example 6 to paragraph (f):* The former employee in the previous example may, on behalf of her employer, write and permit publication of an op-ed piece in a metropolitan newspaper in support of a particular resolution of the merger proposal.

*Example 7 to paragraph (f):* ABC Company has a contract with the Department of Energy which requires that contractor personnel work closely with agency employees in adjoining offices and work stations in the same building. After leaving the Department, a former employee goes to work for another corporation that has an interest in performing certain work related to the same contract, and he arranges a meeting with certain ABC employees at the building where he previously worked on the project. At the meeting, he asks the ABC employees to mention the interest of his new employer to the project supervisor, who is an agency employee. Moreover, he tells the ABC employees that they can say that he was the source of this information. The ABC employees in turn convey this information to the project supervisor. The former employee has made a communication to an employee of the Department of Energy. His communication is directed to an agency employee because he intended that the information be conveyed to an agency employee with the intent that it be attributed to himself, and the circumstances indicate such a close working relationship between contractor personnel and agency employees that it was likely that the information conveyed to contractor personnel would be received by the agency.

(g) *On behalf of any other person—*(1) *On behalf of.* (i) A former employee makes a communication or appearance on behalf of another person if the

former employee is acting as the other person's agent or attorney or if:

(A) The former employee is acting with the consent of the other person, whether express or implied; and

(B) The former employee is acting subject to some degree of control or direction by the other person in relation to the communication or appearance.

(ii) A former employee does not act on behalf of another merely because his communication or appearance is consistent with the interests of the other person, is in support of the other person, or may cause the other person to derive a benefit as a consequence of the former employee's activity.

(2) *Any other person.* The term "person" is defined in § 2641.104. For purposes of this paragraph, the term excludes the former employee himself or any sole proprietorship owned by the former employee.

*Example 1 to paragraph (g):* An employee of the Bureau of Land Management (BLM) participated in the decision to grant a private company the right to explore for minerals on certain Federal lands. After retiring from Federal service to pursue her hobbies, the former employee becomes concerned that BLM is misinterpreting a particular provision of the lease. The former employee may contact a current BLM employee on her own behalf in order to argue that her interpretation is correct.

*Example 2 to paragraph (g):* The former BLM employee from the previous example later joins an environmental organization as an uncompensated volunteer. The leadership of the organization authorizes the former employee to engage in any activity that she believes will advance the interests of the organization. She makes a communication on behalf of the organization when, pursuant to this authority, she writes to BLM on the organization's letterhead in order to present an additional argument concerning the interpretation of the lease provision. Although the organization did not direct her to send the specific communication to BLM, the circumstances establish that she made the communication with the consent of the organization and subject to a degree of control or direction by the organization.

*Example 3 to paragraph (g):* An employee of the Administration for Children and Families wrote the statement of work for a cooperative agreement to be issued to study alternative workplace arrangements. After terminating Government service, the former employee joins a nonprofit group formed to promote family togetherness. He is asked by his former agency to attend a meeting in

order to offer his recommendations concerning the ranking of the grant applications he had reviewed while still a Government employee. The management of the nonprofit group agrees to permit him to take leave to attend the meeting in order to present his personal views concerning the ranking of the applications. Although the former employee is a salaried employee of the non-profit group and his recommendations may be consistent with the group's interests, the circumstances establish that he did not make the communication subject to the control of the group.

*Example 4 to paragraph (g):* An Assistant Secretary of Defense participated in a meeting at which a defense contractor pressed Department of Defense (DOD) officials to continue funding the contractor's sole source contract to develop the prototype of a specialized robot. After terminating Government service, the former Assistant Secretary approaches the contractor and suggests that she can convince her former DOD colleagues to pursue development of the prototype robot. The contractor agrees that the former Assistant Secretary's proposed efforts could be useful and asks her to set up a meeting with key DOD officials for the following week. Although the former Assistant Secretary is not an employee of the contractor, the circumstances establish that she is acting subject to some degree of control or direction by the contractor.

(h) *Particular matter involving a specific party or parties—(1) Basic concept.* The prohibition applies only to communications or appearances made in connection with a "particular matter involving a specific party or parties." Although the statute defines "particular matter" broadly to include "any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding," 18 U.S.C. 207(i)(3), only those particular matters that involve a specific party or parties fall within the prohibition of section 207(a)(1). Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.

*Example 1 to paragraph (h)(1):* An employee of the Department of Housing and Urban Development approved a specific city's application for Federal assistance for a renewal project. After leaving Government service, she may not represent the city in relation to that application as it is a particular matter involving specific parties in which she participated personally and substantially as a Government employee.

*Example 2 to paragraph (h)(1):* An attorney in the Department of Justice drafted provisions of a civil complaint that is filed in Federal court alleging violations of certain environmental laws by ABC Company. The attorney may not subsequently represent ABC before the Government in connection with the lawsuit, which is a particular matter involving specific parties.

(2) *Matters of general applicability not covered.* Legislation or rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability are not particular matters involving specific parties. International agreements, such as treaties and trade agreements, must be evaluated in light of all relevant circumstances to determine whether they should be considered particular matters involving specific parties; relevant considerations include such factors as whether the agreement focuses on a specific property or territory, a specific claim, or addresses a large number of diverse issues or economic interests.

*Example 1 to paragraph (h)(2):* A former employee of the Mine Safety and Health Administration (MSHA) participated personally and substantially in the development of a regulation establishing certain new occupational health and safety standards for mine workers. Because the regulation applies to the entire mining industry, it is a particular matter of general applicability, not a matter involving specific parties, and the former employee would not be prohibited from making post-employment representations to the Government in connection with this regulation.

*Example 2 to paragraph (h)(2):* The former employee in the previous example also assisted MSHA in its defense of a lawsuit brought by a trade association challenging the same regulation. This lawsuit is a particular matter involving specific parties, and the former MSHA employee would be prohibited from representing the trade association or anyone else in connection with the case.

*Example 3 to paragraph (h)(2):* An employee of the National Science Foundation formu-

lated policies for a grant program for organizations nationwide to produce science education programs targeting elementary school age children. She is not prohibited from later representing a specific organization in connection with its application for assistance under the program.

*Example 4 to paragraph (h)(2):* An employee in the legislative affairs office of the Department of Homeland Security (DHS) drafted official comments submitted to Congress with respect to a pending immigration reform bill. After leaving the Government, he contacts DHS on behalf of a private organization seeking to influence the Administration to insist on certain amendments to the bill. This is not prohibited. Generally, legislation is not a particular matter involving specific parties. However, if the same employee had participated as a DHS employee in formulating the agency's position on proposed private relief legislation granting citizenship to a specific individual, this matter would involve specific parties, and the employee would be prohibited from later making representational contacts in connection with this matter.

*Example 5 to paragraph (h)(2):* An employee of the Food and Drug Administration (FDA) drafted a proposed rule requiring all manufacturers of a particular type of medical device to obtain pre-market approval for their products. It was known at the time that only three or four manufacturers currently were marketing or developing such products. However, there was nothing to preclude other manufacturers from entering the market in the future. Moreover, the regulation on its face was not limited in application to those companies already known to be involved with this type of product at the time of promulgation. Because the proposed rule would apply to an open-ended class of manufacturers, not just specifically identified companies, it would not be a particular matter involving specific parties. After leaving Government, the former FDA employee would not be prohibited from representing a manufacturer in connection with the final rule or the application of the rule in any specific case.

*Example 6 to paragraph (h)(2):* A former agency attorney participated in drafting a standard form contract and certain standard terms and clauses for use in all future contracts. The adoption of a standard form and language for all contracts is a matter of general applicability, not a particular matter involving specific parties. Therefore, the attorney would not be prohibited from representing another person in a dispute involving the application of one of the standard terms or clauses in a specific contract in which he did not participate as a Government employee.

*Example 7 to paragraph (h)(2):* An employee of the Department of State participated in

the development of the United States' position with respect to a proposed treaty with a foreign government concerning transfer of ownership with respect to a parcel of real property and certain operations there. After terminating Government employment, this individual seeks to represent the foreign government before the Department with respect to certain issues arising in the final stage of the treaty negotiations. This bilateral treaty is a particular matter involving specific parties, and the former employee had participated personally and substantially in this matter. Note also that certain employees may be subject to additional restrictions with respect to trade and treaty negotiations or representation of a foreign entity, pursuant to 18 U.S.C. 207(b) and (f).

*Example 8 to paragraph (h)(2):* The employee in the previous example participated for the Department in negotiations with respect to a multilateral trade agreement concerning tariffs and other trade practices in regard to various industries in 50 countries. The proposed agreement would provide various stages of implementation, with benchmarks for certain legislative enactments by signatory countries. These negotiations do not concern a particular matter involving specific parties. Even though the former employee would not be prohibited under section 207(a)(1) from representing another person in connection with this matter, she must comply with any applicable restrictions in 18 U.S.C. 207(b) and (f).

(3) *Specific parties at all relevant times.* The particular matter must involve specific parties both at the time the individual participated as a Government employee and at the time the former employee makes the communication or appearance, although the parties need not be identical at both times.

*Example 1 to paragraph (h)(3):* An employee of the Department of Defense (DOD) performed certain feasibility studies and other basic conceptual work for a possible innovation to a missile system. At the time she was involved in the matter, DOD had not identified any prospective contractors who might perform the work on the project. After she left Government, DOD issued a request for proposals to construct the new system, and she now seeks to represent one of the bidders in connection with this procurement. She may do so. Even though the procurement is a particular matter involving specific parties at the time of her proposed representation, no parties to the matter had been identified at the time she participated in the project as a Government employee.

*Example 2 to paragraph (h)(3):* A former employee in an agency inspector general's office conducted the first investigation of its kind concerning a particular fraudulent ac-

counting practice by a grantee. This investigation resulted in a significant monetary recovery for the Government, as well as a settlement agreement in which the grantee agreed to use only certain specified accounting methods in the future. As a result of this case, the agency decided to issue a proposed rule expressly prohibiting the fraudulent accounting practice and requiring all grantees to use the same accounting methods that had been developed in connection with the settlement agreement. The former employee may represent a group of grantees submitting comments critical of the proposed regulation. Although the proposed regulation in some respects evolved from the earlier fraud case, which did involve specific parties, the subsequent rulemaking proceeding does not involve specific parties.

(4) *Preliminary or informal stages in a matter.* When a particular matter involving specific parties begins depends on the facts. A particular matter may involve specific parties prior to any formal action or filings by the agency or other parties. Much of the work with respect to a particular matter is accomplished before the matter reaches its final stage, and preliminary or informal action is covered by the prohibition, provided that specific parties to the matter actually have been identified. With matters such as grants, contracts, and other agreements, ordinarily specific parties are first identified when initial proposals or indications of interest, such as responses to requests for proposals (RFP) or earlier expressions of interest, are received by the Government; in unusual circumstances, however, such as a sole source procurement or when there are sufficient indicia that the Government has explicitly identified a specific party in an otherwise ordinary prospective grant, contract, or agreement, specific parties may be identified even prior to the receipt of a proposal or expression of interest.

*Example 1 to paragraph (h)(4):* A Government employee participated in internal agency deliberations concerning the merits of taking enforcement action against a company for certain trade practices. He left the Government before any charges were filed against the company. He has participated in a particular matter involving specific parties and may not represent another person in connection with the ensuing administrative or judicial proceedings against the company.

*Example 2 to paragraph (h)(4):* A former special Government employee (SGE) of the



Agency for Health Care Policy and Research served, before leaving the agency, on a “peer review” committee that made a recommendation to the agency concerning the technical merits of a specific grant proposal submitted by a university. The committee’s recommendations are nonbinding and constitute only the first of several levels of review within the agency. Nevertheless, the SGE participated in a particular matter involving specific parties and may not represent the university in subsequent efforts to obtain the same grant.

*Example 3 to paragraph (h)(4):* Prior to filing a product approval application with a regulatory agency, a company sought guidance from the agency. The company provided specific information concerning the product, including its composition and intended uses, safety and efficacy data, and the results and designs of prior studies on the product. After a series of meetings, the agency advised the company concerning the design of additional studies that it should perform in order to address those issues that the agency still believed were unresolved. Even though no formal application had been filed, this was a particular matter involving specific parties. The agency guidance was sufficiently specific, and it was clearly intended to address the substance of a prospective application and to guide the prospective applicant in preparing an application that would meet approval requirements. An agency employee who was substantially involved in developing this guidance could not leave the Government and represent the company when it submits its formal product approval application.

*Example 4 to paragraph (h)(4):* A Government scientist participated in preliminary, internal deliberations about her agency’s need for additional laboratory facilities. After she terminated Government service, the General Services Administration issued a request for proposals (RFP) seeking private architectural services to design the new laboratory space for the agency. The former employee may represent an architectural firm in connection with its response to the RFP. During the preliminary stage in which the former employee participated, no specific architectural firms had been identified for the proposed work.

*Example 5 to paragraph (h)(4):* In the previous example, the proposed laboratory was to be an extension of a recently completed laboratory designed by XYZ Architectural Associates, and the Government had determined to pursue a sole source contract with that same firm for the new work. Even before the firm was contacted or expressed any interest concerning the sole source contract, the former employee participated in meetings in which specifications for a potential sole source contract with the firm were discussed. The former employee may not rep-

resent XYZ before the Government in connection with this matter.

(5) *Same particular matter*—(i) *General.* The prohibition applies only to communications or appearances in connection with the same particular matter involving specific parties in which the former employee participated as a Government employee. The same particular matter may continue in another form or in part. In determining whether two particular matters involving specific parties are the same, all relevant factors should be considered, including the extent to which the matters involve the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed.

(ii) *Considerations in the case of contracts, grants, and other agreements.* With respect to matters such as contracts, grants or other agreements:

(A) A new matter typically does not arise simply because there are amendments, modifications, or extensions of a contract (or other agreement), unless there are fundamental changes in objectives or the nature of the matter;

(B) Generally, successive or otherwise separate contracts (or other agreements) will be viewed as different matters from each other, absent some indication that one contract (or other agreement) contemplated the other or that both are in support of the same specific proceeding;

(C) A contract is almost always a single particular matter involving specific parties. However, under compelling circumstances, distinct aspects or phases of certain large umbrella-type contracts, involving separate task orders or delivery orders, may be considered separate individual particular matters involving specific parties, if an agency determines that articulated lines of division exist. In making this determination, an agency should consider the relevant factors as described above. No single factor should be determinative, and any divisions must be based on the contract’s characteristics, which may include, among other things, performance at different geographical locations, separate and distinct subject matters, the separate negotiation or

competition of individual task or delivery orders, and the involvement of different program offices or even different agencies.

*Example 1 to paragraph (h)(5):* An employee drafted one provision of an agency contract to procure new software. After she left Government, a dispute arose under the same contract concerning a provision that she did not draft. She may not represent the contractor in this dispute. The contract as a whole is the particular matter involving specific parties and may not be fractionalized into separate clauses for purposes of avoiding the prohibition of 18 U.S.C. 207(a)(1).

*Example 2 to paragraph (h)(5):* In the previous example, a new software contract was awarded to the same contractor through a full and open competition, following the employee's departure from the agency. Although no major changes were made in the contract terms, the new contract is a different particular matter involving specific parties.

*Example 3 to paragraph (h)(5):* A former special Government employee (SGE) recommended that his agency approve a new food additive made by Good Foods, Inc., on the grounds that it was proven safe for human consumption. The Healthy Food Alliance (HFA) sued the agency in Federal court to challenge the decision to approve the product. After leaving Government service, the former SGE may not serve as an expert witness on behalf of HFA in this litigation because it is a continuation of the same product approval matter in which he participated personally and substantially.

*Example 4 to paragraph (h)(5):* An employee of the Department of the Army negotiated and supervised a contract with Munitions, Inc. for four million mortar shells meeting certain specifications. After the employee left Government, the Army sought a contract modification to add another one million shells. All specifications and contractual terms except price, quantity and delivery dates were identical to those in the original contract. The former Army employee may not represent Munitions in connection with this modification, because it is part of the same particular matter involving specific parties as the original contract.

*Example 5 to paragraph (h)(5):* In the previous example, certain changes in technology occurred since the date of the original contract, and the proposed contract modifications would require the additional shells to incorporate new design features. Moreover, because of changes in the Army's internal system for storing and distributing shells to various locations, the modifications would require Munitions to deliver its product to several de-centralized destination points, thus requiring Munitions to develop novel delivery and handling systems and

incur new transportation costs. The Army considers these modifications to be fundamental changes in the approach and objectives of the contract and may determine that these changes constitute a new particular matter.

*Example 6 to paragraph (h)(5):* A Government employee reviewed and approved certain wiretap applications. The prosecution of a person overheard during the wiretap, although not originally targeted, must be regarded as part of the same particular matter as the original wiretap application. The reason is that the validity of the wiretap may be put in issue and many of the facts giving rise to the wiretap application would be involved.

*Example 7 to paragraph (h)(5):* The Navy awards an indefinite delivery contract for environmental remediation services in the northeastern U.S. A Navy engineer is assigned as the Navy's technical representative on a task order for remediation of an oil spill at a Navy activity in Maine. The Navy engineer is personally and substantially involved in the task order (e.g., he negotiates the scope of work, the labor hours required, and monitors the contractor's performance). Following successful completion of the remediation of the oil spill in Maine, the Navy engineer leaves Government service and goes to work for the Navy's remediation contractor. In year two of the contract, the Navy issues a task order for the remediation of lead-based paint at a Navy housing complex in Connecticut. The contractor assigns the former Navy engineer to be its project manager for this task order, which will require him to negotiate with the Navy about the scope of work and the labor hours under the task order. Although the task order is placed under the same indefinite delivery contract (the terms of which remain unchanged), the Navy would be justified in determining that the lead-based paint task order is a separate particular matter as it involves a different type of remediation, at a different location, and at a different time. Note, however, that the engineer in this example had not participated personally and substantially in the overall contract. Any former employee who had—for example, by participating personally and substantially in the initial award or subsequent oversight of the umbrella contract—will be deemed to have also participated personally and substantially in any individual particular matters resulting from the agency's determination that such contract is divisible.

*Example 8 to paragraph (h)(5):* An agency contracts with Company A to install a satellite system connecting the headquarters office to each of its twenty field offices. Although the field offices are located at various locations throughout the country, each installation is essentially identical, with the

terms of each negotiated in the main contract. Therefore, this contract should not be divided into separate particular matters involving specific parties.

(i) *Participated personally and substantially*—(1) *Participate*. To “participate” means to take an action as an employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action, or to purposefully forbear in order to affect the outcome of a matter. An employee can participate in particular matters that are pending other than in his own agency. An employee does not participate in a matter merely because he had knowledge of its existence or because it was pending under his official responsibility. An employee does not participate in a matter within the meaning of this section unless he does so in his official capacity.

(2) *Personally*. To participate “personally” means to participate:

- (i) Directly, either individually or in combination with other persons; or
- (ii) Through direct and active supervision of the participation of any person he supervises, including a subordinate.

(3) *Substantially*. To participate “substantially” means that the employee’s involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Provided that an employee participates in the substantive merits of a matter, his participation may be substantial even though his role in the matter, or the aspect of the matter in which he is participating, may be minor in relation to the matter as a whole. Participation in peripheral aspects of a matter or in aspects not directly involving the substantive merits of a matter (such as reviewing budg-

etary procedures or scheduling meetings) is not substantial.

*Example 1 to paragraph (i):* A General Services Administration (GSA) attorney drafted a standard form contract and certain standard terms and clauses for use in future contracts. A contracting officer uses one of the standard clauses in a subsequent contract without consulting the GSA attorney. The attorney did not participate personally in the subsequent contract.

*Example 2 to paragraph (i):* An Internal Revenue Service (IRS) attorney is neither in charge of nor does she have official responsibility for litigation involving a particular delinquent taxpayer. At the request of a co-worker who is assigned responsibility for the litigation, the lawyer provides advice concerning strategy during the discovery stage of the litigation. The IRS attorney participated personally in the litigation.

*Example 3 to paragraph (i):* The IRS attorney in the previous example had no further involvement in the litigation. She participated substantially in the litigation notwithstanding that the post-discovery stages of the litigation lasted for ten years after the day she offered her advice.

*Example 4 to paragraph (i):* The General Counsel of the Office of Government Ethics (OGE) contacts the OGE attorney who is assigned to evaluate all requests for “certificates of divestiture” to check on the status of the attorney’s work with respect to all pending requests. The General Counsel makes no comment concerning the merits or relative importance of any particular request. The General Counsel did not participate substantially in any particular request when she checked on the status of all pending requests.

*Example 5 to paragraph (i):* The OGE attorney in the previous example completes his evaluation of a particular certificate of divestiture request and forwards his recommendation to the General Counsel. The General Counsel forwards the package to the Director of OGE with a note indicating her concurrence with the attorney’s recommendation. The General Counsel participated substantially in the request.

*Example 6 to paragraph (i):* An International Trade Commission (ITC) computer programmer developed software designed to analyze data related to unfair trade practice complaints. At the request of an ITC employee who is considering the merits of a particular complaint, the programmer enters all the data supplied to her, runs the computer program, and forwards the results to the employee who will make a recommendation to an ITC Commissioner concerning the disposition of the complaint. The programmer did not participate substantially in the complaint.

*Example 7 to paragraph (i):* The director of an agency office must concur in any decision to grant an application for technical assistance to certain nonprofit entities. When a particular application for assistance comes into her office and is presented to her for decision, she intentionally takes no action on it because she believes the application will raise difficult policy questions for her agency at this time. As a consequence of her inaction, the resolution of the application is deferred indefinitely. She has participated personally and substantially in the matter.

(j) *United States is a party or has a direct and substantial interest—*(1) *United States.* For purposes of this paragraph, the “United States” means:

- (i) The executive branch (including a Government corporation);
- (ii) The legislative branch; or
- (iii) The judicial branch.

(2) *Party or direct and substantial interest.* The United States may be a party to or have a direct and substantial interest in a particular matter even though it is pending in a non-Federal forum, such as a State court. The United States is neither a party to nor does it have a direct and substantial interest in a particular matter merely because a Federal statute is at issue or a Federal court is serving as the forum for resolution of the matter. When it is not clear whether the United States is a party to or has a direct and substantial interest in a particular matter, this determination shall be made in accordance with the following procedure:

(i) *Coordination by designated agency ethics official.* The designated agency ethics official (DAEO) for the former employee’s agency shall have the primary responsibility for coordinating this determination. When it appears likely that a component of the United States Government other than the former employee’s former agency may be a party to or have a direct and substantial interest in the particular matter, the DAEO shall coordinate with agency ethics officials serving in those components.

(ii) *Agency determination.* A component of the United States Government shall determine if it is a party to or has a direct and substantial interest in a matter in accordance with its own internal procedures. It shall consider all relevant factors, including whether:

(A) The component has a financial interest in the matter;

(B) The matter is likely to have an effect on the policies, programs, or operations of the component;

(C) The component is involved in any proceeding associated with the matter, e.g., as by having provided witnesses or documentary evidence; and

(D) The component has more than an academic interest in the outcome of the matter.

*Example 1 to paragraph (j):* An attorney participated in preparing the Government’s antitrust action against Z Company. After leaving the Government, she may not represent Z Company in a private antitrust action brought against it by X Company on the same facts involved in the Government action. Nor may she represent X Company in that matter. The interest of the United States in preventing both inconsistent results and the appearance of impropriety in the same factual matter involving the same party, Z Company, is direct and substantial. However, if the Government’s antitrust investigation or case is closed, the United States no longer has a direct and substantial interest in the case.

**§ 2641.202 Two-year restriction on any former employee’s representations to United States concerning particular matter for which the employee had official responsibility.**

(a) *Basic prohibition of 18 U.S.C. 207(a)(2).* For two years after his Government service terminates, no former employee shall knowingly, with the intent to influence, make any communication to or appearance before an employee of the United States on behalf of any other person in connection with a particular matter involving a specific party or parties, in which the United States is a party or has a direct and substantial interest, and which such person knows or reasonably should know was actually pending under his official responsibility within the one-year period prior to the termination of his Government service.

(b) *Exceptions and waivers.* The prohibition of 18 U.S.C. 207(a)(2) does not apply to a former employee who is:

(1) Acting on behalf of the United States. *See* § 2641.301(a).

(2) Acting as an elected State or local government official. *See* § 2641.301(b).

## Office of Government Ethics

## § 2641.202

(3) Communicating scientific or technological information pursuant to procedures or certification. *See* § 2641.301(e).

(4) Testifying under oath. *See* § 2641.301(f).

(5) Acting on behalf of an international organization pursuant to a waiver. *See* § 2641.301(h).

(6) Acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver. *See* § 2641.301(i).

(c) *Commencement and length of restriction.* 18 U.S.C. 207(a)(2) is a two-year restriction that commences upon an employee's termination from Government service. *See* example 9 to paragraph (j) of this section.

(d) *Communication or appearance.* *See* § 2641.201(d).

(e) *With the intent to influence.* *See* § 2641.201(e).

(f) *To or before an employee of the United States* *See* § 2641.201(f).

(g) *On behalf of any other person.* *See* § 2641.201(g).

(h) *Particular matter involving a specific party or parties.* *See* § 2641.201(h).

(i) *United States is a party or has a direct and substantial interest.* *See* § 2641.201(j).

(j) *Official responsibility*—(1) *Definition.* “Official responsibility” means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action. Ordinarily, the scope of an employee's official responsibility is determined by those functions assigned by statute, regulation, Executive order, job description, or delegation of authority. All particular matters under consideration in an agency are under the official responsibility of the agency head and each is under that of any intermediate supervisor who supervises a person, including a subordinate, who actually participates in the matter or who has been assigned to participate in the matter within the scope of his official duties. A nonsupervisory employee does not have official responsibility for his own assignments within the meaning of section 207(a)(2). Authority to direct Government action concerning

only ancillary or nonsubstantive aspects of a matter, such as budgeting, equal employment, scheduling, or format requirements does not, ordinarily, constitute official responsibility for the matter as a whole.

(2) *Actually pending.* A matter is actually pending under an employee's official responsibility if it has been referred to the employee for assignment or has been referred to or is under consideration by any person he supervises, including a subordinate. A matter remains pending even when it is not under “active” consideration. There is no requirement that the matter must have been pending under the employee's official responsibility for a certain length of time.

(3) *Temporary duties.* An employee ordinarily acquires official responsibility for all matters within the scope of his position immediately upon assuming the position. However, under certain circumstances, an employee who is on detail (or other temporary assignment) to a position or who is serving in an “acting” status might not be deemed to have official responsibility for any matter by virtue of such temporary duties. Specifically, an employee performing such temporary duties will not thereby acquire official responsibility for matters within the scope of the position where he functions only in a limited “caretaker” capacity, as evidenced by such factors as:

(i) Whether the employee serves in the position for no more than 60 consecutive calendar days;

(ii) Whether there is actually another incumbent for the position, who is temporarily absent, for example, on travel or leave;

(iii) Whether there has been no event triggering the provisions of 5 U.S.C. 3345(a); and

(iv) Whether there are any other circumstances indicating that, given the temporary nature of the detail or acting status, there was no reasonable expectation of the full authority of the position.

(4) *Effect of leave status.* The scope of an employee's official responsibility is not affected by annual leave, terminal leave, sick leave, excused absence, leave without pay, or similar absence from assigned duties.

(5) *Effect of disqualification.* Official responsibility for a matter is not eliminated through self-disqualification or avoidance of personal participation in a matter, as when an employee is disqualified from participating in a matter in accordance with subparts D, E, or F of 5 CFR part 2635 or part 2640. Official responsibility for a matter can be terminated by a formal modification of an employee's responsibilities, such as by a change in the employee's position description.

(6) *One-year period before termination.* 18 U.S.C. 207(a)(2) applies only with respect to a particular matter that was actually pending under the former employee's official responsibility:

(i) At some time when the matter involved a specific party or parties; and

(ii) Within his last year of Government service.

(7) *Knowledge of official responsibility.* A communication or appearance is not prohibited unless, at the time of the proposed post-employment communication or appearance, the former employee knows or reasonably should know that the matter was actually pending under his official responsibility within the one-year period prior to his termination from Government service. It is not necessary that a former employee have known during his Government service that the matter was actually pending under his official responsibility.

NOTE TO PARAGRAPH (j): 18 U.S.C. 207(a)(2) requires only that the former employee "reasonably should know" that the matter was pending under his official responsibility. Consequently, when the facts suggest that a particular matter involving specific parties could have been actually pending under his official responsibility, a former employee should seek information from an agency ethics official or other Government official to clarify his role in the matter. See § 2641.105 concerning advice.

*Example 1 to paragraph (j):* The position description of an Assistant Secretary of Housing and Urban Development specifies that he is responsible for a certain class of grants. These grants are handled by an office under his supervision. As a practical matter, however, the Assistant Secretary has not become involved with any grants of this type. The Assistant Secretary has official responsibility for all such grants as specified in his position description.

*Example 2 to paragraph (j):* A budget officer at the National Oceanic and Atmospheric Administration (NOAA) is asked to review NOAA's budget to determine if there are funds still available for the purchase of a new hurricane tracking device. The budget officer does not have official responsibility for the resulting contract even though she is responsible for all budget matters within the agency. The identification of funds for the contract is an ancillary aspect of the contract.

*Example 3 to paragraph (j):* An Internal Revenue Service (IRS) auditor worked in the office responsible for the tax-exempt status of nonprofit organizations. Subsequently, he was transferred to the IRS office concerned with public relations. When contacted by an employee of his former office for advice concerning a matter involving a certain nonprofit organization, the auditor provides useful suggestions. The auditor's supervisor in the public relations office does not have official responsibility for the nonprofit matter since it does not fall within the scope of the auditor's current duties.

*Example 4 to paragraph (j):* An information manager at the Central Intelligence Agency (CIA) assigns a nonsupervisory subordinate to research an issue concerning a request from a news organization for information concerning past agency activities. Before she commences any work on the assignment, the subordinate terminates employment with the CIA. The request was not pending under the subordinate's official responsibility since a non-supervisory employee does not have official responsibility for her own assignments. (Once the subordinate commences work on the assignment, she may be participating "personally and substantially" within the meaning of 18 U.S.C. 207(a)(1) and § 2641.201(i).)

*Example 5 to paragraph (j):* A regional employee of the Federal Emergency Management Agency requests guidance from the General Counsel concerning a contractual dispute with Baker Company. The General Counsel immediately assigns the matter to a staff attorney whose workload can accommodate the assignment, then retires from Government two days later. Although the staff attorney did not retrieve the assignment from his in-box prior to the General Counsel's departure, the Baker matter was actually pending under the General Counsel's official responsibility from the time the General Counsel received the request for guidance.

*Example 6 to paragraph (j):* A staff attorney in the Federal Emergency Management Agency's Office of General Counsel is consulted by procurement officers concerning the correct resolution of a contractual matter involving Able Company. The attorney renders an opinion resolving the question.

## Office of Government Ethics

## § 2641.203

The same legal question arises later in several contracts with other companies but none of the disputes with such companies is referred to the Office of General Counsel. The General Counsel had official responsibility for the determination of the Able Company matter, but the subsequent matters were never actually pending under his official responsibility.

*Example 7 to paragraph (j):* An employee of the National Endowment for the Humanities becomes “acting” Division Director of the Division of Education Programs when the Division Director is away from the office for three days to attend a conference. During those three days, the employee has authority to direct Government action in connection with many matters with which she ordinarily would have no involvement. However, in view of the brief time period and the fact that there remains an incumbent in the position of Division Director, the agency ethics official properly may determine that the acting official did not acquire official responsibility for all matters then pending in the Division.

*Example 8 to paragraph (j):* A division director at the Food and Drug Administration disqualified himself from participating in the review of a drug for Alzheimer’s disease, in accordance with subpart E of 5 CFR part 2635, because his brother headed the private sector team which developed the drug. The matter was instead assigned to the division director’s deputy. The director continues to have official responsibility for review of the drug. The division director also would have retained official responsibility for the matter had he either asked his supervisor or another division director to oversee the matter.

*Example 9 to paragraph (j):* The Deputy Secretary of a department terminates Government service to stay home with her newborn daughter. Four months later, she returns to the department to serve on an advisory committee as a special Government employee (SGE). After three months, she terminates Government service once again in order to accept a part-time position with a public relations firm. The 18 U.S.C. 207(a)(2) bar commences when she resigns as Deputy Secretary and continues to run for two years. (Any action taken in carrying out official duties as a member of the advisory committee would be undertaken on behalf of the United States and would, therefore, not be restricted by 18 U.S.C. 207(a)(2). *See* § 2641.301(a).) A second two-year restriction commences when she terminates from her second period of Government service but it applies only with respect to any particular

matter actually pending under her official responsibility during her three-month term as an SGE.

### **§ 2641.203 One-year restriction on any former employee’s representations, aid, or advice concerning ongoing trade or treaty negotiation.**

(a) *Basic prohibition of 18 U.S.C. 207(b).* For one year after his Government service terminates, no former employee shall, on the basis of “covered information,” knowingly represent, aid, or advise any other person concerning an ongoing trade or treaty negotiation in which, during his last year of Government service, he participated personally and substantially as an employee. “Covered information” refers to agency records which were accessible to the employee which he knew or should have known were designated as exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552).

(b) *Exceptions and waivers.* The prohibition of 18 U.S.C. 207(b) does not apply to a former employee who is:

(1) Acting on behalf of the United States. *See* § 2641.301(a).

(2) Acting as an elected State or local government official. *See* § 2641.301(b).

(3) Testifying under oath. *See* § 2641.301(f).

(4) Acting on behalf of an international organization pursuant to a waiver. *See* § 2641.301(h).

(5) Acting as an employee at a Government-owned, contractor-operated entity pursuant to a waiver. *See* § 2641.301(i).

(c) *Commencement and length of restriction.* 18 U.S.C. 207(b) commences upon an employee’s termination from Government service. The restriction lasts for one year or until the termination of the negotiation, whichever occurs first.

(d) *Represent, aid, or advise.* [Reserved]

(e) *Any other person.* [Reserved]

(f) *On the basis of.* [Reserved]

(g) *Covered information.* [Reserved]

(h) *Ongoing trade or treaty negotiation.* [Reserved]

(i) *Participated personally and substantially.* [Reserved]

**§ 2641.204 One-year restriction on any former senior employee's representations to former agency concerning any matter, regardless of prior involvement.**

(a) *Basic prohibition of 18 U.S.C. 207(c).* For one year after his service in a senior position terminates, no former senior employee may knowingly, with the intent to influence, make any communication to or appearance before an employee of an agency in which he served in any capacity within the one-year period prior to his termination from a senior position, if that communication or appearance is made on behalf of any other person in connection with any matter on which the former senior employee seeks official action by any employee of such agency. An individual who served in a "very senior employee" position is subject to the broader two-year restriction set forth in 18 U.S.C. 207(d) in lieu of that set forth in section 207(c). *See* § 2641.205.

(b) *Exceptions and waivers.* The prohibition of 18 U.S.C. 207(c) does not apply to a former senior employee who is:

- (1) Acting on behalf of the United States. *See* § 2641.301(a).
- (2) Acting as an elected State or local government official. *See* § 2641.301(b).
- (3) Acting on behalf of specified entities. *See* § 2641.301(c).
- (4) Making uncompensated statements based on special knowledge. *See* § 2641.301(d).
- (5) Communicating scientific or technological information pursuant to procedures or certification. *See* § 2641.301(e).
- (6) Testifying under oath. *See* § 2641.301(f).
- (7) Acting on behalf of a candidate or political party. *See* § 2641.301(g).
- (8) Acting on behalf of an international organization pursuant to a waiver. *See* § 2641.301(h).
- (9) Acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver. *See* § 2641.301(i).
- (10) Subject to a waiver issued for certain positions. *See* § 2641.301(j).

(c) *Applicability to special Government employees and Intergovernmental Personnel Act appointees or detailees*—(1) *Special Government employees.* (i) 18 U.S.C. 207(c) applies to an individual as

a result of service as a special Government employee (SGE) who:

(A) Served in a senior employee position while serving as an SGE; and

(B) Served 60 or more days as an SGE during the one-year period before terminating service as a senior employee.

(ii) Any day on which work is performed shall count toward the 60-day threshold without regard to the number of hours worked that day or whether the day falls on a weekend or holiday. For purposes of determining whether an SGE's rate of basic pay is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule, within the meaning of the definition of senior employee in § 2641.104, the employee's hourly rate of pay (or daily rate divided by eight) shall be multiplied by 2087, the number of Federal working hours in one year. (In the case of a Reserve officer of the Armed Forces or an officer of the National Guard who is an SGE serving in a senior employee position, 18 U.S.C. 207(c) applies if the officer served 60 or more days as an SGE within the one-year period prior to his termination from a period of active duty or active duty for training.)

(2) *Intergovernmental Personnel Act appointees or detailees.* 18 U.S.C. 207(c) applies to an individual serving as a senior employee pursuant to an appointment or detail under the Intergovernmental Personnel Act, 5 U.S.C. 3371–3376. An individual is a senior employee if he received total pay from Federal or non-Federal sources equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule (exclusive of any reimbursement for a non-Federal employer's share of benefits not paid to the employee as salary), and:

(i) The individual served in a Federal position ordinarily compensated at a rate equal to or greater than 86.5 percent of level II of the Executive Schedule, regardless of what portion of the pay is derived from Federal expenditures or expenditures by the individual's non-Federal employer;

(ii) The individual received a direct Federal payment, pursuant to 5 U.S.C. 3374(c)(1), that supplemented the salary that he received from his non-Federal employer; or



(iii) The individual's non-Federal employer received Federal reimbursement equal to or greater than 86.5 percent of level II of the Executive Schedule.

*Example 1 to paragraph (c):* An employee of a private research institution serves on an advisory committee that convenes periodically to discuss United States policy on foreign arms sales. The expert is compensated at a daily rate which is the equivalent of 86.5 percent of the rate of basic pay for a full-time employee at level II of the Executive Schedule. The individual serves two hours per day for 65 days before resigning from the advisory committee nine months later. The individual becomes subject to 18 U.S.C. 207(c) when she resigns from the advisory committee since she served 60 or more days as a special Government employee during the one-year period before terminating service as a senior employee.

*Example 2 to paragraph (c):* An individual is detailed from a university to a Federal department under the Intergovernmental Personnel Act to do work that had previously been performed by a GS-15 employee. While on detail, the individual continues to receive pay from the university in an amount \$5,000 less than 86.5 percent of the rate of basic pay for level II of the Executive Schedule. In addition, the department pays a \$25,000 supplement directly to the individual, as authorized by 5 U.S.C. 3374(c)(1). Since the employee's total pay is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule, and a portion of that compensation is paid directly to the individual by the department, he becomes subject to 18 U.S.C. 207(c) when his detail ends.

(d) *Commencement and length of restriction.* 18 U.S.C. 207(c) is a one-year restriction. The one-year period is measured from the date when the employee ceases to serve in a senior employee position, not from the termination of Government service, unless the two events occur simultaneously. (In the case of a Reserve officer of the Armed Forces or an officer of the National Guard who is a special Government employee serving in a senior employee position, section 207(c) is measured from the date when the officer terminates a period of active duty or active duty for training.)

*Example 1 to paragraph (d):* An employee at the Department of Labor (DOL) serves in a senior employee position. He then accepts a GS-15 position at the Federal Labor Relations Authority (FLRA) but terminates Government service six months later to accept a job with private industry. 18 U.S.C. 207(c)

commences when he ceases to be a senior employee at DOL, even though he does not terminate Government service at that time. (Any action taken in carrying out official duties on behalf of FLRA while still employed by that agency would be undertaken on behalf of the United States and would, therefore, not be restricted by section 207(c). See § 2641.301(a).)

*Example 2 to paragraph (d):* In the previous example, the DOL employee accepts a senior employee position at FLRA rather than a GS-15 position. The bar of section 207(c) commences when, six months later, he terminates service in the second senior employee position to accept a job with private industry. (The bar will apply with respect to both the DOL and FLRA. See paragraph (g) of § 2641.204 and examples 2 and 3 to that paragraph.)

(e) *Communication or appearance.* See § 2641.201(d).

(f) *With the intent to influence.* See § 2641.201(e).

(g) *To or before employee of former agency—(1) Employee.* For purposes of this paragraph, a former senior employee may not contact:

(i) Any current Federal employee of the former senior employee's "former agency" as defined in paragraph (g)(2) of this section;

(ii) An individual detailed under the Intergovernmental Personnel Act (5 U.S.C. 3371-3376) to the former senior employee's former agency;

(iii) An individual detailed to the former senior employee's former agency from another department, agency or other entity, including agencies and entities within the legislative or judicial branches;

(iv) An individual serving with the former senior employee's former agency as a collateral duty pursuant to statute or Executive order; and

(v) In the case of a communication or appearance made by a former senior employee who is barred by 18 U.S.C. 207(c) from communicating to or appearing before the Executive Office of the President, the President and Vice President.

(2) *Former agency.* The term "agency" is defined in § 2641.104. Unless eligible to benefit from the designation of distinct and separate agency components as described in § 2641.302, a former senior employee's former agency will ordinarily be considered to be the whole of any larger agency of which his former

agency was a part on the date he terminated senior service.

(i) *One-year period before termination.* 18 U.S.C. 207(c) applies with respect to agencies in which the former senior employee served within the one-year period prior to his termination from a senior employee position.

(ii) *Served in any capacity.* Once the restriction commences, 18 U.S.C. 207(c) applies with respect to any agency in which the former senior employee served in any capacity during the one-year period, regardless of his position, rate of basic pay, or pay grade.

(iii) *Multiple assignments.* An employee can simultaneously serve in more than one agency. A former senior employee will be considered to have served in his own employing entity and in any entity to which he was detailed for any length of time or with which he was required to serve as a collateral duty pursuant to statute or Executive order.

(iv) *Effect of organizational changes.* If a former senior employee's former agency has been significantly altered by organizational changes after his termination from senior service, it may be necessary to determine whether a successor entity is the same agency as the former senior employee's former agency. The appropriate designated agency ethics official, in consultation with the Office of Government Ethics, shall identify the entity that is the individual's former agency. Whether a successor entity is the same as the former agency depends upon whether it has substantially the same organizational mission, the extent of the termination or dispersion of the agency's functions, and other factors as may be appropriate.

(A) *Agency abolished or substantially changed.* If a successor entity is not identifiable as substantially the same agency from which the former senior employee terminated, the 18 U.S.C. 207(c) prohibition will not bar communications or appearances by the former senior employee to that successor entity.

(B) *Agency substantially the same.* If a successor entity remains identifiable as substantially the same entity from which the former senior employee terminated, the 18 U.S.C. 207(c) bar will

extend to the whole of the successor entity.

(C) *Employing entity is made separate.* If an employing entity is made separate from an agency of which it was a part, but it remains identifiable as substantially the same entity from which the former senior employee terminated senior service before the entity was made separate, the 18 U.S.C. 207(c) bar will apply to a former senior employee of that entity only with respect to the new separate entity.

(D) *Component designations.* If a former senior employee's former agency was a designated "component" within the meaning of §2641.302 on the date of his termination as senior employee, see §2641.302(g).

(3) *To or before.* Except as provided in paragraph (g)(4) of this section, a communication "to" or appearance "before" an employee of a former senior employee's former agency is one:

(i) Directed to and received by the former senior employee's former agency, even though not addressed to a particular employee; or

(ii) Directed to and received by an employee of a former senior employee's former agency in his official capacity, including in his capacity as an employee serving in the agency on detail or, if pursuant to statute or Executive order, as a collateral duty. A former senior employee does not direct his communication or appearance to a bystander who merely happens to overhear the communication or witness the appearance.

(4) *Public commentary.* (i) A former senior employee who addresses a public gathering or a conference, seminar, or similar forum as a speaker or panel participant will not be considered to make a prohibited communication or appearance if the forum:

(A) Is not sponsored or co-sponsored by the former senior employee's former agency;

(B) Is attended by a large number of people; and

(C) A significant proportion of those attending are not employees of the former senior employee's former agency.

(ii) In the circumstances described in paragraph (g)(4)(i) of this section, a former senior employee may engage in

exchanges with any other speaker or with any member of the audience.

(iii) A former senior employee also may permit the broadcast or publication of a commentary provided that it is broadcast or appears in a newspaper, periodical, or similar widely-available publication.

*Example 1 to paragraph (g):* Two months after retiring from a senior employee position at the United States Department of Agriculture (USDA), the former senior employee is asked to represent a poultry producer in a compliance matter involving the producer's storage practices. The former senior employee may not represent the poultry producer before a USDA employee in connection with the compliance matter or any other matter in which official action is sought from the USDA. He has ten months remaining of the one-year bar which commenced upon his termination as a senior employee with the USDA.

*Example 2 to paragraph (g):* An individual serves for several years at the Commodity Futures Trading Commission (CFTC) as a GS-15. With no break in service, she then accepts a senior employee position at the Export-Import Bank of the United States (Ex-Im Bank) where she remains for nine months until she leaves Government service in order to accept a position in the private sector. Since the individual served in both the CFTC and the Ex-Im Bank within her last year of senior service, she is barred by 18 U.S.C. 207(c) as to both agencies for one year commencing from her termination from the senior employee position at the Ex-Im Bank.

*Example 3 to paragraph (g):* An individual serves for several years at the Securities and Exchange Commission (SEC) in a senior employee position. He terminates Government service in order to care for his parent who is recovering from heart surgery. Two months later, he accepts a senior employee position at the Overseas Private Investment Corporation (OPIC) where he remains for nine months until he leaves Government service in order to accept a position in the private sector. The 18 U.S.C. 207(c) bar commences when he resigns from the SEC and continues to run for one year. (Any action taken in carrying out official duties as an employee of OPIC would be undertaken on behalf of the United States and would, therefore, not be restricted by section 207(c). See § 2641.301(a).) A second one-year restriction commences when he resigns from OPIC. The second restriction will apply with respect to OPIC only. Upon his termination from the OPIC position, he will have one remaining month of the section 207(c) restriction arising from his termination of his SEC position. This remaining month of restriction will run

concurrently with the first month of the one-year OPIC restriction.

*Example 4 to paragraph (g):* An architect serves in a senior employee position in the Agency for Affordable Housing. Subsequent to her termination from the position, the agency is abolished and its functions are distributed among three other agencies within three departments, the Department of Housing and Urban Development, the Department of the Interior, and the Department of Justice. None of these successor entities is identifiable as substantially the same entity as the Agency for Affordable Housing, and, accordingly, the 18 U.S.C. 207(c) bar will not apply to the architect.

*Example 5 to paragraph (g):* A chemist serves in a senior employee position in the Agency for Clean Rivers. Subsequent to his termination from the position, the mission of the Agency for Clean Rivers is expanded and it is renamed the Agency for Clean Water. A number of employees from the Agency for Marine Life are transferred to the reorganized agency. If it is determined that the Agency for Clean Water is substantially the same entity from which the chemist terminated, the section 207(c) bar will apply with respect to the chemist's contacts with all of the employees of the Agency for Clean Water, including those employees who recently transferred from the Agency for Marine Life. He would not be barred from contacting an employee serving in one of the positions that had been transferred from the Agency for Clean Rivers to the Agency for Clean Land.

(h) *On behalf of any other person.* See § 2641.201(g).

(i) *Matter on which former senior employee seeks official action—(1) Seeks official action.* A former senior employee seeks official action when the circumstances establish that he is making his communication or appearance for the purpose of inducing a current employee, as defined in paragraph (g) of this section, to make a decision or to otherwise act in his official capacity.

(2) *Matter.* The prohibition on seeking official action applies with respect to any matter, including:

(i) Any "particular matter involving a specific party or parties" as defined in § 2641.201(h);

(ii) The consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons;

(iii) A new matter that was not previously pending at or of interest to the former senior employee's former agency; and

(iv) A matter pending at any other agency in the executive branch, an independent agency, the legislative branch, or the judicial branch.

*Example 1 to paragraph (i):* A former senior employee at the National Capital Planning Commission (NCPC) wishes to contact a friend who still works at the NCPC to solicit a donation for a local charitable organization. The former senior employee may do so since the circumstances establish that he would not be making the communication for the purpose of inducing the NCPC employee to make a decision in his official capacity about the donation.

*Example 2 to paragraph (i):* A former senior employee at the Department of Defense wishes to contact the Secretary of Defense to ask him if he would be interested in attending a cocktail party. At the party, the former senior employee would introduce the Secretary to several of the former senior employee's current business clients who have sought the introduction. The former senior employee and the Secretary do not have a history of socializing outside the office, the Secretary is in a position to affect the interests of the business clients, and all expenses associated with the party will be paid by the former senior employee's consulting firm. The former senior employee should not contact the Secretary. The circumstances do not establish that the communication would be made other than for the purpose of inducing the Secretary to make a decision in his official capacity about the invitation.

*Example 3 to paragraph (i):* A former senior employee at the National Science Foundation (NSF) accepts a position as vice president of a company that was hurt by recent cuts in the defense budget. She contacts the NSF's Director of Legislative and Public Affairs to ask the Director to contact a White House official in order to press the need for a new science policy to benefit her company. The former senior employee made a communication for the purpose of inducing the NSF employee to make a decision in his official capacity about contacting the White House.

**§ 2641.205 Two-year restriction on any former very senior employee's representations to former agency or certain officials concerning any matter, regardless of prior involvement.**

(a) *Basic prohibition of 18 U.S.C. 207(d).* For two years after his service in a very senior employee position terminates, no former very senior employee shall knowingly, with the intent to influence, make any communication to or appearance before any official appointed to an Executive Schedule posi-

tion listed in 5 U.S.C. 5312–5316 or before any employee of an agency in which he served as a very senior employee within the one-year period prior to his termination from a very senior employee position, if that communication or appearance is made on behalf of any other person in connection with any matter on which the former very senior employee seeks official action by any official or employee.

(b) *Exceptions and waivers.* The prohibition of 18 U.S.C. 207(d) does not apply to a former very senior employee who is:

(1) Acting on behalf of the United States. *See* § 2641.301(a).

(2) Acting as an elected State or local government official. *See* § 2641.301(b).

(3) Acting on behalf of specified entities. *See* § 2641.301(c).

(4) Making uncompensated statements based on special knowledge. *See* § 2641.301(d).

(5) Communicating scientific or technological information pursuant to procedures or certification. *See* § 2641.301(e).

(6) Testifying under oath. *See* § 2641.301(f).

(7) Acting on behalf of a candidate or political party. *See* § 2641.301(g).

(8) Acting on behalf of an international organization pursuant to a waiver. *See* § 2641.301(h).

(9) Acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver. *See* § 2641.301(i).

(c) *Commencement and length of restriction.* 18 U.S.C. 207(d) is a two-year restriction. The two-year period is measured from the date when the employee ceases to serve in a very senior employee position, not from the termination of Government service, unless the two events occur simultaneously. *See* examples 1 and 2 to paragraph (d) of § 2641.204.

(d) *Communication or appearance.* *See* § 2641.201(d).

(e) *With the intent to influence.* *See* § 2641.201(e).

(f) *To or before employee of former agency.* *See* § 2641.204(g), except that this section covers only former very senior employees and applies only with respect to the agency or agencies in which a former very senior employee

## Office of Government Ethics

## §2641.206

served as a very senior employee, and very senior employees do not benefit from the designation of distinct and separate agency components as referenced in §2641.204(g)(2).

(g) *To or before an official appointed to an Executive Schedule position.* See §2641.204(g)(3) for “to or before,” except that this section covers only former very senior employees and also extends to a communication or appearance before any official currently appointed to a position that is listed in sections 5 U.S.C. 5312–5316.

NOTE TO PARAGRAPH (g): A communication made to an official described in 5 U.S.C. 5312–5316 can include a communication to a subordinate of such official with the intent that the information be conveyed directly to the official and attributed to the former very senior employee.

(h) *On behalf of any other person.* See §2641.201(g).

(i) *Matter on which former very senior employee seeks official action.* See §2641.204(i), except that this section only covers former very senior employees.

*Example 1 to §2641.205:* The former Attorney General may not contact the Assistant Attorney General of the Antitrust Division on behalf of a professional sports league in support of a proposed exemption from certain laws, nor may he contact the Secretary of Labor. He may, however, speak directly to the President or Vice President concerning the issue.

*Example 2 to §2641.205:* The former Director of the Office of Management and Budget (OMB) is now the Chief Executive Officer of a major computer firm and wishes to convince the new Administration to change its new policy concerning computer chips. The former OMB Director may contact an employee of the Department of Commerce who, although paid at a level fixed according to level III of the Executive Schedule, does not occupy a position actually listed in 5 U.S.C. 5312–5316. She could not contact an employee working in the Office of the United States Trade Representative, an office within the Executive Office of the President (her former agency).

*Example 3 to §2641.205:* A senior employee serves in the Department of Agriculture for several years. He is then appointed to serve as the Secretary of Health and Human Services (HHS) but resigns seven months later. Since the individual served as a very senior employee only at HHS, he is barred for two years by 18 U.S.C. 207(d) as to any employee of HHS and any official currently appointed

to an Executive Schedule position listed in 5 U.S.C. 5312–5316, including any such official serving in the Department of Agriculture. (In addition, a one-year section 207(c) bar commenced when he terminated service as a senior employee at the Department of Agriculture.)

*Example 4 to §2641.205:* The former Secretary of the Department of Labor may not represent another person in a meeting with the current Secretary of Transportation to discuss a proposed regulation on highway safety standards.

*Example 5 to §2641.205:* In the previous example, the former very senior employee would like to meet instead with the special assistant to the Secretary of Transportation. The former employee knows that the special assistant has a close working relationship with the Secretary. The former employee expects that the special assistant would brief the Secretary about any discussions at the proposed meeting and refer specifically to the former employee. Because the circumstances indicate that the former employee intends that the information provided at the meeting would be conveyed by the assistant directly to the Secretary and attributed to the former employee, he may not meet with the assistant.

### **§2641.206 One-year restriction on any former senior or very senior employee's representations on behalf of, or aid or advice to, a foreign entity.**

(a) *Basic prohibition of 18 U.S.C. 207(f).* For one year after service in a senior or very senior employee position terminates, no former senior employee or former very senior employee shall knowingly represent a foreign government or foreign political party before an officer or employee of an agency or department of the United States, or aid or advise such a foreign entity, with the intent to influence a decision of such officer or employee. For purposes of describing persons who may not be contacted with the intent to influence, under 18 U.S.C. 207(f) and this section, the phrase “officer or employee” includes the President, the Vice President, and Members of Congress, and the term “department” includes the legislative branch of government.

(b) *Exceptions and waivers.* The prohibition of 18 U.S.C. 207(f) does not apply to a former senior or former very senior employee who is:

(1) Acting on behalf of the United States. See §2641.301(a). (Note, however, the limitation in §2641.301(a)(2)(ii).)

## § 2641.207

(2) Acting as an elected State or local government official. *See* § 2641.301(b).

(3) Testifying under oath. *See* § 2641.301(f).

(4) Acting on behalf of an international organization pursuant to a waiver. *See* § 2641.301(h).

(5) Acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver. *See* § 2641.301(i).

(6) Subject to a waiver issued for certain positions. *See* § 2641.301(j).

(c) *Commencement and length of restriction*—(1) *Generally*. Except as provided in paragraph (c)(2) of this section, 18 U.S.C. 207(f) is a one-year restriction. The one-year period is measured from the date when an employee ceases to be a senior or very senior employee, not from the termination of Government service, unless the two occur simultaneously. *See* examples 1 and 2 to paragraph (d) of § 2641.204.

(2) *U.S. Trade Representative or Deputy U.S. Trade Representative*. 18 U.S.C. 207(f) is a permanent restriction as applied to a former U.S. Trade Representative or Deputy U.S. Trade Representative.

(d) *Represent, aid, or advise*. [Reserved]

(e) *With the intent to influence*. [Reserved]

(f) *Decision of employee of an agency*. [Reserved]

(g) *Foreign entity*. [Reserved]

### **§ 2641.207 One-year restriction on any former private sector assignee under the Information Technology Exchange Program representing, aiding, counseling or assisting in representing in connection with any contract with former agency.**

(a) *Basic prohibition of 18 U.S.C. 207(l)*. For one year after the termination of his assignment from a private sector organization to an agency under the Information Technology Exchange Program, 5 U.S.C. chapter 37, no former assignee shall knowingly represent, or aid, counsel or assist in representing any other person in connection with any contract with that agency.

(b) *Exceptions and waivers*. The prohibition of 18 U.S.C. 207(l) does not apply to a former employee who is:

(1) Acting on behalf of the United States. *See* § 2641.301(a).

## 5 CFR Ch. XVI (1–1–16 Edition)

(2) Acting as an elected State or local government official. *See* § 2641.301(b).

(3) Testifying under oath. *See* § 2641.301(f).

(4) Acting on behalf of an international organization pursuant to a waiver. *See* § 2641.301(h).

(5) Acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver. *See* § 2641.301(i).

(c) *Commencement and length of restriction*. 18 U.S.C. 207(l) is a one-year restriction. The one-year period is measured from the date when the individual's assignment under the Information Technology Exchange Program terminates.

(d) *Represent, aid, counsel, or assist in representing*. [Reserved]

(e) *In connection with any contract with the former agency*. [Reserved]

### **Subpart C—Exceptions, Waivers and Separate Components**

#### **§ 2641.301 Statutory exceptions and waivers.**

(a) *Exception for acting on behalf of United States*. A former employee is not prohibited by any of the prohibitions of 18 U.S.C. 207 from engaging in any activity on behalf of the United States.

(1) *United States*. For purposes of this paragraph, the term “United States” means:

(i) The executive branch (including a Government corporation);

(ii) The legislative branch; or

(iii) The judicial branch.

(2) *On behalf of the United States*. A former employee will be deemed to engage in the activity on behalf of the United States if he acts in accordance with paragraph (a)(2)(i) or (a)(2)(ii) of this section.

(i) *As employee of the United States*. A former employee engages in an activity on behalf of the United States when he carries out official duties as a current employee of the United States.

(ii) *As other than employee of the United States*. (A) Provided that he does not represent, aid, or advise a foreign entity in violation of 18 U.S.C. 207(f), a former employee engages in an activity on behalf of the United States when he serves:

(1) As a representative of the United States pursuant to a specific agreement with the United States to provide representational services to the United States; or

(2) As a witness called by the United States (including a Congressional committee or subcommittee) to testify at a Congressional hearing (even if applicable procedural rules do not require him to declare by oath or affirmation that he will testify truthfully).

(B) A former employee will not be deemed to engage in an activity on behalf of the United States merely because he is performing work funded by the Government, because he is engaging in the activity in response to a contact initiated by the Government, because the Government will derive some benefit from the activity, or because he or the person on whose behalf he is acting may share the same objective as the Government.

NOTE TO PARAGRAPH (a)(2)(ii): *See also* §2641.301(f) concerning the permissibility of testimony under oath, including testimony as an expert witness, when a former employee is called as a witness by the United States.

*Example 1 to paragraph (a):* An employee of the Department of Transportation (DOT) transfers to become an employee of the Pension Benefit Guaranty Corporation (PBGC). The PBGC, a wholly owned Government corporation, is a corporation in which the United States has a proprietary interest. The former DOT employee may press the PBGC's point of view in a meeting with DOT employees concerning an airline bankruptcy case in which he was personally and substantially involved while at the DOT. His communications to the DOT on behalf of the PBGC would be made on behalf of the United States.

*Example 2 to paragraph (a):* A Federal Transit Administration (FTA) employee recommended against the funding of a certain subway project. After terminating Government service, she is hired by a Congressman as a member of his staff to perform a variety of duties, including miscellaneous services for the Congressman's constituents. The former employee may contact the FTA on behalf of a constituent group as part of her official duties in order to argue for the reversal of the subway funding decision in which she participated while still an employee of the FTA. Her communications to the FTA on behalf of the constituent group would be made on behalf of the United States.

*Example 3 to paragraph (a):* A Postal Service attorney participated in discussions with

the Office of Personnel Management (OPM) concerning a dispute over the mailing of health plan brochures. After terminating Government service, the attorney joins a law firm as a partner. He is assigned by the firm's managing partner to represent the Postal Service pursuant to a contract requiring the firm to provide certain legal services. The former senior employee may represent the Postal Service in meetings with OPM concerning the dispute about the health plan brochures. The former senior employee's suggestions to the Postal Service concerning strategy and his arguments to OPM concerning the dispute would be made on behalf of the United States (even though he is also acting on behalf of his law firm when he performs representational services for the United States). A communication to the Postal Service concerning a disagreement about the law firm's fee, however, would not be made on behalf of the United States.

*Example 4 to paragraph (a):* A former senior employee of the Food and Drug Administration (FDA), now an employee of a drug company, is called by a Congressional committee to give unsworn testimony concerning the desirability of instituting cost controls in the pharmaceutical industry. The former senior employee may address the committee even though her testimony will unavoidably also be directed to a current employee of the FDA who has also been asked to testify as a member of the same panel of experts. The former employee's communications at the hearing, provided at the request of the United States, would be made on behalf of the United States.

*Example 5 to paragraph (a):* A National Security Agency (NSA) analyst drafted the specifications for a contract that was awarded to the Secure Data Corporation to develop prototype software for the processing of foreign intelligence information. After terminating Government service, the analyst is hired by the corporation. The former employee may not attempt to persuade NSA officials that the software is in accord with the specifications. Although the development of the software is expected to significantly enhance the processing of foreign intelligence information and the former employee's opinions might be useful to current NSA employees, his communications would not be made on behalf of the United States.

*Example 6 to paragraph (a):* A senior employee at the Department of the Air Force specialized in issues relating to the effective utilization of personnel. After terminating Government service, the former senior employee is hired by a contractor operating a Federally Funded Research and Development Center (FFRDC). The FFRDC is not a "Government corporation" as defined in §2641.104.

The former senior employee may not attempt to convince the Air Force of the manner in which Air Force funding should be allocated among projects proposed to be undertaken by the FFRDC. Although the work performed by the FFRDC will be determined by the Air Force, may be accomplished at Government-owned facilities, and will benefit the Government, her communications would not be made on behalf of the United States.

*Example 7 to paragraph (a):* A Department of Justice (DOJ) attorney represented the United States in a civil enforcement action against a company that had engaged in fraudulent activity. The settlement of the case required that the company correct certain deficiencies in its operating procedures. After terminating Government service, the attorney is hired by the company. When DOJ auditors schedule a meeting with the company's legal staff to review company actions since the settlement, the former employee may not attempt to persuade the auditors that the company is complying with the terms of the settlement. Although the former employee's insights might facilitate the audit, his communications would not be made on behalf of the United States even though the Government's auditors initiated the contact with the former employee.

NOTE TO PARAGRAPH (a): See also example 9 to paragraph (j) of § 2641.202 and example 1 to paragraph (d) of § 2641.204.

(b) *Exception for acting on behalf of State or local government as elected official.* A former employee is not prohibited by any of the prohibitions of 18 U.S.C. 207 from engaging in any post-employment activity on behalf of one or more State or local governments, provided the activity is undertaken in carrying out official duties as an elected official of a State or local government.

*Example 1 to paragraph (b):* A former employee of the Department of Housing and Urban Development (HUD) participated personally and substantially in the evaluation of a grant application from a certain city. After terminating Government service, he was elected mayor of that city. The former employee may contact an Assistant Secretary at HUD to argue that additional funds are due the city under the terms of the grant.

*Example 2 to paragraph (b):* A former employee of the Federal Highway Administration (FHWA) participated personally and substantially in the decision to provide funding for a bridge across the White River in Arkansas. After terminating Government service, she accepted the Governor's offer to head the highway department in Arkansas. A

communication to or appearance before the FHWA concerning the terms of the construction grant would not be made as an elected official of a State or local government.

(c) *Exception for acting on behalf of specified entities.* A former senior or very senior employee is not prohibited by 18 U.S.C. 207(c) or (d), or §§ 2641.204 or 2641.205, from making a communication or appearance on behalf of one or more entities specified in paragraph (c)(1) of this section, provided the communication or appearance is made in carrying out official duties as an employee of a specified entity.

(1) *Specified entities.* For purposes of this paragraph, a specified entity is:

(i) An agency or instrumentality of a State or local government;

(ii) A hospital or medical research organization, if exempted from taxation under 26 U.S.C. 501(c)(3); or

(iii) An accredited, degree-granting institution of higher education, as defined in 20 U.S.C. 1001.

(2) *Employee.* For purposes of this paragraph, the term "employee" of a specified entity means a person who has an employee-employer relationship with an entity specified in paragraph (c)(1) of this section. It includes a person who is employed to work part-time for a specified entity. The term excludes an individual performing services for a specified entity as a consultant or independent contractor.

*Example 1 to paragraph (c):* A senior employee leaves her position at the National Institutes of Health (NIH) and takes a full-time position at the Gene Research Foundation, a tax-exempt organization pursuant to 26 U.S.C. 501(c)(3). As an employee of a 501(c)(3) tax-exempt medical research organization, the former senior employee is not barred by 18 U.S.C. 207(c) from representing the Foundation before the NIH.

*Example 2 to paragraph (c):* A former senior employee of the Environmental Protection Agency (EPA) joins a law firm in Richmond, Virginia. The firm is hired by the Commonwealth of Virginia to represent it in discussions with the EPA about an environmental impact statement concerning the construction of a highway interchange. The former senior employee's arguments concerning the environmental impact statement would not be made as an employee of the Commonwealth of Virginia.

*Example 3 to paragraph (c):* A former senior employee becomes an employee of the ABC



Association. The ABC Association is a nonprofit organization whose membership consists of a broad representation of State health agencies and senior State health officials, and it performs services from which certain State governments benefit, including collecting information from its members and conveying that information and views to the Federal Government. However, the ABC Association has not been delegated authority by any State government to perform any governmental functions, and it does not operate under the regulatory, financial, or management control of any State government. Therefore, the ABC Association is not an agency or instrumentality of a State government, and the former senior employee may not represent the organization before his former agency within one year after terminating his senior employee position.

(d) *Exception for uncompensated statements based on special knowledge.* A former senior or very senior employee is not prohibited by 18 U.S.C. 207(c) or (d), or §§2641.204 or 2641.205, from making a statement based on his own special knowledge in the particular area that is the subject of the statement, provided that he receives no compensation for making the statement.

(1) *Special knowledge.* A former employee has special knowledge concerning a subject area if he is familiar with the subject area as a result of education, interaction with experts, or other unique or particularized experience.

(2) *Statement.* A statement for purposes of this paragraph is a communication of facts observed by the former employee.

(3) *Compensation.* Compensation includes any form of remuneration or income that is given in consideration, in whole or in part, for the statement. It does not include the payment of actual and necessary expenses incurred in connection with making the statement.

*Example 1 to paragraph (d):* A senior employee of the Department of the Treasury was personally and substantially involved in discussions with other Department officials concerning the advisability of a three-phase reduction in the capital gains tax. After Government service, the former senior employee affiliates with a nonprofit group that advocates a position on the three-phase capital gains issue that is similar to his own. The former senior employee, who receives no salary from the nonprofit organization, may meet with current Department officials on

the organization's behalf to state what steps had previously been taken by the Department to address the issue. The statement would be permissible even if the nonprofit organization reimbursed the former senior employee for his actual and necessary travel expenses incurred in connection with making the statement.

*Example 2 to paragraph (d):* A former senior employee becomes a government relations consultant, and he enters into a \$5,000 per month retainer agreement with XYZ Corporation for government relations services. He would like to meet with his former agency to discuss a regulatory matter involving his client. Even though he would not be paid by XYZ specifically for this particular meeting, he nevertheless would receive compensation for any statements at the meeting, because of the monthly payments under his standing retainer agreement. Therefore he may not rely on the exception for uncompensated statements based on special knowledge.

(e) *Exception for furnishing scientific or technological information.* A former employee is not prohibited by 18 U.S.C. 207(a), (c), or (d), or §§2641.201, 2641.202, 2641.204, or 2641.205, from making communications, including appearances, solely for the purpose of furnishing scientific or technological information, provided the communications are made either in accordance with procedures adopted by the agency or agencies to which the communications are directed or the head of such agency or agencies, in consultation with the Director of the Office of Government Ethics, makes a certification published in the FEDERAL REGISTER.

(1) *Purpose of information.* A communication made solely for the purpose of furnishing scientific or technological information may be:

(i) Made in connection with a matter that involves an appreciable element of actual or potential dispute;

(ii) Made in connection with an effort to seek a discretionary Government ruling, benefit, approval, or other action; or

(iii) Inherently influential in relation to the matter in dispute or the Government action sought.

(2) *Scientific or technological information.* The former employee must convey information of a scientific or technological character, such as technical or engineering information relating to the natural sciences. The exception does

not extend to information associated with a nontechnical discipline such as law, economics, or political science.

(3) *Incidental references or remarks.* Provided the former employee's communication primarily conveys information of a scientific or technological character, the entirety of the communication will be deemed made solely for the purpose of furnishing such information notwithstanding an incidental reference or remark:

(i) Unrelated to the matter to which the post-employment restriction applies;

(ii) Concerning feasibility, risk, cost, speed of implementation, or other considerations when necessary to appreciate the practical significance of the basic scientific or technological information provided; or

(iii) Intended to facilitate the furnishing of scientific or technological information, such as those references or remarks necessary to determine the kind and form of information required or the adequacy of information already supplied.

*Example 1 to paragraph (e)(3):* After terminating Government service, a former senior employee at the National Security Agency (NSA) accepts a position as a senior manager at a firm specializing in the development of advanced security systems. The former senior employee and another firm employee place a conference call to a current NSA employee to follow up on an earlier discussion in which the firm had sought funding from the NSA to develop a certain proposed security system. After the other firm employee explains the scientific principles underlying the proposed system, the former employee may not state the system's expected cost. Her communication would not primarily convey information of a scientific or technological character.

*Example 2 to paragraph (e)(3):* If, in the previous example, the former senior employee explained the scientific principles underlying the proposed system, she could also have stated its expected cost as an incidental reference or remark.

(4) *Communications made under procedures acceptable to the agency.* (i) An agency may adopt such procedures as are acceptable to it, specifying conditions under which former Government employees may make communications solely for the purpose of furnishing scientific or technological information, in light of the agency's particular pro-

grams and needs. In promulgating such procedures, an agency may consider, for example, one or more of the following:

(A) Requiring that the former employee specifically invoke the exception prior to making a communication (or series of communications);

(B) Requiring that the designated agency ethics official for the agency to which the communication is directed (or other agency designee) be informed when the exception is used;

(C) Limiting communications to certain formats which are least conducive to the use of personal influence;

(D) Segregating, to the extent possible, meetings and presentations involving technical substance from those involving other aspects of the matter; or

(E) Employing more restrictive practices in relation to communications concerning specified categories of matters or specified aspects of a matter, such as in relation to the pre-award as distinguished from the post-award phase of a procurement.

(ii) The Director of the Office of Government Ethics may review any agency implementation of this exception in connection with OGE's executive branch ethics program oversight responsibilities. *See* 5 CFR part 2638.

*Example 1 to paragraph (e)(4):* A Marine Corps engineer participates personally and substantially in drafting the specifications for a new assault rifle. After terminating Government service, he accepts a job with the company that was awarded the contract to produce the rifle. Provided he acts in accordance with agency procedures, he may accompany the President of the company to a meeting with Marine Corps employees and report the results of a series of metallurgical tests. These results support the company's argument that it has complied with a particular specification. He may do so even though the meeting was expected to be and is, in fact, a contentious one in which the company's testing methods are at issue. He may not, however, present the company's argument that an advance payment is due the company under the terms of the contract since this would not be a mere incidental reference or remark within the meaning of paragraph (e)(3) of this section.

(5) *Certification for expertise in technical discipline.* A certification issued in accordance with this section shall be

## Office of Government Ethics

## §2641.301

effective on the date it is executed (unless a later date is specified), provided that it is transmitted to the FEDERAL REGISTER for publication.

(i) *Criteria for issuance.* A certification issued in accordance with this section may not broaden the scope of the exception and may be issued only when:

(A) The former employee has outstanding qualifications in a scientific, technological, or other technical discipline (involving engineering or other natural sciences as distinguished from a nontechnical discipline such as law, economics, or political science);

(B) The matter requires the use of such qualifications; and

(C) The national interest would be served by the former employee's participation.

(ii) *Submission of requests.* The individual wishing to make the communication shall forward a written request to the head of the agency to which the communications would be directed. Any such request shall address the criteria set forth in paragraph (e)(5)(i) of this section.

(iii) *Issuance.* The head of the agency to which the communications would be directed may, upon finding that the criteria specified in paragraph (e)(5)(i) of this section are satisfied, approve the request by executing a certification, which shall be published in the FEDERAL REGISTER. A copy of the certification shall be forwarded to the affected individual. The head of the agency shall, prior to execution of the certification, furnish a draft copy of the certification to the Director of the Office of Government Ethics and consider the Director's comments, if any, in relation to the draft. The certification shall specify:

(A) The name of the former employee;

(B) The Government position or positions held by the former employee during his most recent period of Government service;

(C) The identity of the employer or other person on behalf of which the former employee will be acting;

(D) The restriction or restrictions to which the certification shall apply;

(E) Any limitations imposed by the agency head with respect to the scope of the certification; and

(F) The basis for finding that the criteria specified in paragraph (e)(5)(i) of this section are satisfied, specifically including a description of the matter and the communications that will be permissible or, if relevant, a statement that such information is protected from disclosure by statute.

(iv) *Copy to Office of Government Ethics.* Once published, the agency shall provide the Director of the Office of Government Ethics with a copy of the certification as published in the FEDERAL REGISTER.

(v) *Revocation.* The agency head may revoke a certification and shall forward a written notice of the revocation to the former employee and to the OGE Director. Revocation of a certification shall be effective on the date specified in the notice revoking the certification.

(f) *Exception for giving testimony under oath or making statements required to be made under penalty of perjury.* Subject to the limitation described in paragraph (f)(2) of this section concerning expert witness testimony, a former employee is not prohibited by any of the prohibitions of 18 U.S.C. 207 from giving testimony under oath or making a statement required to be made under penalty of perjury.

(1) *Testimony under oath.* Testimony under oath is evidence delivered by a witness either orally or in writing, including deposition testimony and written affidavits, in connection with a judicial, quasi-judicial, administrative, or other legally recognized proceeding in which applicable procedural rules require a witness to declare by oath or affirmation that he will testify truthfully.

(2) *Limitation on exception for service as an expert witness.* The exception described in paragraph (f)(1) of this section does not negate the bar of 18 U.S.C. 207(a)(1), or §2641.201, to a former employee serving as an expert witness; where the bar of section 207(a)(1) applies, a former employee may not serve as an expert witness except:

(i) If he is called as a witness by the United States; or

(ii) By court order. For this purpose, a subpoena is not a court order, nor is an order merely qualifying an individual to testify as an expert witness.

(3) *Statements made under penalty of perjury.* A former employee may make any statement required to be made under penalty of perjury, except that he may not:

(i) Submit a pleading, application, or other document as an attorney or other representative; or

(ii) Serve as an expert witness where the bar of 18 U.S.C. 207(a)(1) applies, except as provided in paragraph (f)(2) of this section.

NOTE TO PARAGRAPH (f): Whether compensation of a witness is appropriate is not addressed by 18 U.S.C. 207. However, 18 U.S.C. 201 may prohibit individuals from receiving compensation for testifying under oath in certain forums except as authorized by 18 U.S.C. 201(d). Note also that there may be statutory or other bars on the disclosure by a current or former employee of information from the agency's files or acquired in connection with the individual's employment with the Government; a former employee's agency may have promulgated procedures to be followed with respect to the production or disclosure of such information.

*Example 1 to paragraph (f):* A former employee is subpoenaed to testify in a case pending in a United States district court concerning events at the agency she observed while she was performing her official duties with the Government. She is not prohibited by 18 U.S.C. 207 from testifying as a fact witness in the case.

*Example 2 to paragraph (f):* An employee was removed from service by his agency in connection with a series of incidents where the employee was absent without leave or was unable to perform his duties because he appeared to be intoxicated. The employee's supervisor, who had assisted the agency in handling the issues associated with the removal, subsequently left Government. In the ensuing case in Federal court between the employee who had been removed and his agency over whether he had been discriminated against because of his disabling alcoholism, his former supervisor was asked whether on certain occasions the employee had been intoxicated on the job and unable to perform his assigned duties. Opposing counsel objected to the question on the basis that the question required expert testimony and the witness had not been qualified as an expert. The judge overruled the objection on the basis that the witness would not be providing expert testimony but opinions or inferences which are rationally based on his perception and helpful to a clear under-

standing of his testimony or the determination of a fact in issue. The former employee may provide the requested testimony without violating 18 U.S.C. 207.

*Example 3 to paragraph (f):* A former senior employee of the Environmental Protection Agency (EPA) is a recognized expert concerning compliance with Clean Air Act requirements. Within one year after terminating Government service, she is retained by a utility company that is the defendant in a lawsuit filed against it by the EPA. While the matter had been pending while she was with the agency, she had not worked on the matter. After the court rules that she is qualified to testify as an expert, the former senior employee may offer her sworn opinion that the utility company's practices are in compliance with Clean Air Act requirements. She may do so although she would otherwise have been barred by 18 U.S.C. 207(c) from making the communication to the EPA.

*Example 4 to paragraph (f):* In the previous example, an EPA scientist served as a member of the EPA investigatory team that compiled a report concerning the utility company's practices during the discovery stage of the lawsuit. She later terminated Government service to join a consulting firm and is hired by the utility company to assist it in its defense. She may not, without a court order, serve as an expert witness for the company in the matter since she is barred by 18 U.S.C. 207(a)(1) from making the communication to the EPA. On application by the utility company for a court order permitting her service as an expert witness, the court found that there were no extraordinary circumstances that would justify overriding the specific statutory bar to such testimony. Such extraordinary circumstances might be where no other equivalent expert testimony can be obtained and an employee's prior involvement in the matter would not cause her testimony to have an undue influence on proceedings. Without such extraordinary circumstances, ordering such expert witness testimony would undermine the bar on such testimony.

(g) *Exception for representing certain candidates or political organizations.* Except as provided in paragraph (g)(2) of this section, a former senior or very senior employee is not prohibited by 18 U.S.C. 207(c) or (d), or §§ 2641.204 or 2641.205, from making a communication or appearance on behalf of a candidate in his capacity as a candidate or an entity specified in paragraphs (g)(1)(ii) through (g)(1)(vi) of this section.

(1) *Specified persons or entities.* For purposes of this paragraph (g), the specified persons or entities are:

(i) A *candidate*. A candidate means any person who seeks nomination for election, or election to, Federal or State office or who has authorized others to explore on his own behalf the possibility of seeking nomination for election, or election to, Federal or State office;

(ii) An *authorized committee*. An authorized committee means any political committee designated in writing by a candidate as authorized to receive contributions or make expenditures to promote the nomination or election of the candidate or to explore the possibility of seeking the nomination or election of the candidate. The term does not include a committee that receives contributions or makes expenditures to promote more than one candidate;

(iii) A *national committee*. A national committee means the organization which, under the bylaws of a political party, is responsible for the day-to-day operation of the political party at the national level;

(iv) A *national Federal campaign committee*. A national Federal campaign committee means an organization which, under the bylaws of a political party, is established primarily to provide assistance at the national level to candidates nominated by the party for election to the office of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress;

(v) A *State committee*. A State committee means the organization which, under the bylaws of a political party, is responsible for the day-to-day operation of the political party at the State level; or

(vi) A *political party*. A political party means an association, committee, or organization that nominates a candidate for election to any Federal or State elected office whose name appears on the election ballot as the candidate of the association, committee, or organization.

(2) *Limitations*. The exception in this paragraph (g) shall not apply if the communication or appearance:

(i) Is made at a time the former senior or very senior employee is employed by any person or entity other than:

(A) A person or entity specified in paragraph (g)(1) of this section; or

(B) A person or entity who exclusively represents, aids, or advises persons or entities described in paragraph (g)(1) of this section;

(ii) Is made other than solely on behalf of one or more persons or entities specified in paragraph (g)(1) or (g)(2)(i)(B) of this section; or

(iii) Is made to or before the Federal Election Commission by a former senior or very senior employee of the Federal Election Commission.

*Example 1 to paragraph (g):* The former Deputy Director of the Office of Management and Budget becomes the full-time head of the President's re-election committee. The former Deputy Director may, within two years of terminating his very senior employee position, represent the re-election committee to the White House travel office in discussions regarding the appropriate amounts of reimbursements by the committee of political travel costs of the President.

*Example 2 to paragraph (g):* The former U.S. Attorney General is asked by a candidate running for Governor of Alabama to contact the Chairman of the Federal Trade Commission (a position listed in 5 U.S.C. 5314) to seek the dismissal of a pending enforcement action involving the candidate's family business. The former very senior employee's communication to the Chairman would not be made on behalf of the candidate in his capacity as a candidate and, thus, would be barred by 18 U.S.C. 207(d).

*Example 3 to paragraph (g):* In the previous example, the former Attorney General could contact the Commissioner of Internal Revenue (a position listed in 5 U.S.C. 5314) to urge the review of a tax ruling affecting Alabama's Republican Party since the communication would be made on behalf of a State committee.

*Example 4 to paragraph (g):* The former Assistant Secretary for Legislative and Intergovernmental Affairs at the Department of Commerce is hired as a consultant by a company that provides advisory services to political candidates and senior executives in private industry. Her only client is a candidate for the U.S. Senate. The former senior employee may not contact the Deputy Secretary of Commerce within one year of her termination from the Department to request that the Deputy Secretary give an official speech in which he would express support for legislation proposed by the candidate. The communication would be prohibited by 18 U.S.C. 207(c) because it would be made when the former senior employee was employed by an entity that did not exclusively represent,

aid, or advise persons or entities specified in paragraph (g)(1) of this section.

(h) *Waiver for acting on behalf of international organization.* The Secretary of State may grant an individual waiver of one or more of the restrictions in 18 U.S.C. 207 where the former employee would appear or communicate on behalf of, or provide aid or advice to, an international organization in which the United States participates. The Secretary of State must certify in advance that the proposed activity is in the interest of the United States.

NOTE TO PARAGRAPH (h): An employee who is detailed under 5 U.S.C. 3343 to an international organization remains an employee of his agency. In contrast, an employee who transfers under 5 U.S.C. 3581–3584 to an international organization is a former employee of his agency.

(i) *Waiver for re-employment by Government-owned, contractor-operated entity.* The President may grant a waiver of one or more of the restrictions in 18 U.S.C. 207 to eligible employees upon the determination and certification in writing that the waiver is in the public interest and the services of the individual are critically needed for the benefit of the Federal Government. Upon the issuance of a waiver pursuant to this paragraph, the restriction or restrictions waived will not apply to a former employee acting as an employee of the same Government-owned, contractor-operated entity with which he was employed immediately before the period of Government service during which the waiver was granted. If the individual was employed by the Lawrence Livermore National Laboratory, the Los Alamos National Laboratory, or the Sandia National Laboratory immediately before the person's Federal Government employment began, the restriction or restrictions waived shall not apply to a former employee acting as an employee of any one of those three national laboratories after the former employee's Government service has terminated.

(1) *Eligible employees.* Any current civilian employee of the executive branch, other than an employee serving in the Executive Office of the President, who served as an officer or employee at a Government-owned, contractor-operated entity immediately

before he became a Government employee. A total of no more than 25 current employees shall hold waivers at any one time.

(2) *Issuance.* The President may not delegate the authority to issue waivers under this paragraph. If the President issues a waiver, a certification shall be published in the FEDERAL REGISTER and shall identify:

(i) The employee covered by the waiver by name and position; and

(ii) The reasons for granting the waiver.

(3) *Copy to Office of Government Ethics.* A copy of the certification shall be provided to the Director of the Office of Government Ethics (OGE).

(4) *Effective date.* A waiver issued under this section shall be effective on the date the certification is published in the FEDERAL REGISTER.

(5) *Reports.* Each former employee holding a waiver must submit semi-annual reports, for a period of two years after terminating Government service, to the President and the OGE Director.

(i) *Submission.* The reports shall be submitted:

(A) Not later than six months and 60 days after the date of the former employee's termination from the period of Government service during which the waiver was granted; and

(B) Not later than 60 days after the end of any successive six-month period.

(ii) *Content.* Each report shall describe all activities undertaken by the former employee during the six-month period that would have been prohibited by 18 U.S.C. 207 but for the waiver.

(iii) *Public availability.* All reports filed with the OGE Director under this paragraph shall be made available for public inspection and copying.

NOTE TO PARAGRAPH (i)(5): 18 U.S.C. 207(k)(5)(D) specifies that an individual who is granted a waiver as described in this paragraph is ineligible for appointment in the civil service unless all reports required by that section have been filed.

(6) *Revocation.* A waiver shall be revoked when the recipient of the waiver fails to file a report required by paragraph (i)(4) of this section, and the recipient of the waiver shall be notified of such revocation. The revocation

## Office of Government Ethics

## §2641.301

shall take effect upon the person's receipt of the notification and shall remain in effect until the report is filed.

(j) *Waiver of restrictions of 18 U.S.C. 207(c) and (f) for certain positions.* The Director of the Office of Government Ethics may waive application of the restriction of section 18 U.S.C. 207(c) and §2641.204, with respect to certain positions or categories of positions. When the restriction of 18 U.S.C. 207(c) has been waived by the Director pursuant to this paragraph, the one-year restriction of 18 U.S.C. 207(f) and §2641.206 also will not be triggered upon an employee's termination from the position.

(1) *Eligible senior employee positions.* A position which could be occupied by a senior employee is eligible for a waiver of the 18 U.S.C. 207(c) restriction except:

(i) The following positions are ineligible:

(A) Positions for which the rate of pay is specified in or fixed according to 5 U.S.C. 5311-5318 (the Executive Schedule);

(B) Positions for which occupants are appointed by the President pursuant to 3 U.S.C. 105(a)(2)(B); or

(C) Positions for which occupants are appointed by the Vice President pursuant to 3 U.S.C. 106(a)(1)(B).

(ii) Regardless of the position occupied, private sector assignees under the Information Technology Exchange Program, within the meaning of paragraph (6) of the definition of senior employee in section 2641.104, are not eligible to benefit from a waiver.

*Example 1 to paragraph (j)(1):* The head of a department has authority to fix the annual salary for a category of positions administratively at a rate of compensation not in excess of the rate of compensation provided for level IV of the Executive Schedule (5 U.S.C. 5315). He sets a salary level that does not reference any Executive Schedule salary. The level of compensation is not "specified in" or "fixed according to" the Executive Schedule. If the authority pursuant to which compensation for a position is set instead stated that the position is to be paid at the rate of level IV of the Executive Schedule, the salary for the position would be fixed according to the Executive Schedule.

(2) *Criteria for waiver.* A waiver of restrictions for a position or category of positions shall be based on findings that:

(i) The agency has experienced or is experiencing undue hardship in obtaining qualified personnel to fill such position or positions as shown by relevant factors which may include, but are not limited to:

(A) Vacancy rates;

(B) The payment of a special rate of pay to the incumbent of the position pursuant to specific statutory authority; or

(C) The requirement that the incumbent of the position have outstanding qualifications in a scientific, technological, technical, or other specialized discipline;

(ii) Waiver of the restriction with respect to the position or positions is expected to ameliorate the recruiting difficulties; and

(iii) The granting of the waiver would not create the potential for the use of undue influence or unfair advantage based on past Government service, including the potential for use of such influence or advantage for the benefit of a foreign entity.

(3) *Procedures.* A waiver shall be granted in accordance with the following procedures:

(i) *Agency recommendation.* An agency's designated agency ethics official (DAEO) may, at any time, recommend the waiver of the 18 U.S.C. 207(c) (and section 207(f)) restriction for a position or category of positions by forwarding a written request to the Director addressing the criteria set forth in paragraph (j)(2) of this section. A DAEO may, at any time, request that a current waiver be revoked.

(ii) *Action by Office of Government Ethics.* The Director of the Office of Government Ethics shall promptly provide to the designated agency ethics official a written response to each request for waiver or revocation. The Director shall maintain a listing of positions or categories of positions in appendix A to this part for which the 18 U.S.C. 207(c) restriction has been waived. The Director shall publish notice in the FEDERAL REGISTER when revoking a waiver.

(4) *Effective dates.* A waiver shall be effective on the date of the written response to the designated agency ethics official indicating that the request for waiver has been granted. A waiver

§ 2641.301

5 CFR Ch. XVI (1–1–16 Edition)

shall inure to the benefit of the individual who holds the position when the waiver takes effect, as well as to his successors, but shall not benefit individuals who terminated senior service prior to the effective date of the waiver. Revocation of a waiver shall be effective 90 days after the date that the OGE Director publishes notice of the revocation in the FEDERAL REGISTER. Individuals who formerly served in a position for which a waiver of restrictions was applicable will not become subject to 18 U.S.C. 207(c) (or section 207(f)) if the waiver is revoked after their termination from the position.

(k) *Miscellaneous statutory exceptions.* Several statutory authorities specifically modify the scope of 18 U.S.C. 207 as it would otherwise apply to a former employee or class of former employees. These authorities include:

(1) 22 U.S.C. 3310(c), permitting employees of the American Institute in Taiwan to represent the Institute notwithstanding 18 U.S.C. 207;

(2) 22 U.S.C. 3613(d), permitting the individual who was Administrator of the Panama Canal Commission on the date of its termination to act in carrying out official duties as Administrator of the Panama Canal Authority notwithstanding 18 U.S.C. 207;

(3) 22 U.S.C. 3622(e), permitting an individual who was an employee of the Panama Canal Commission on the date of its termination to act in carrying out official duties on behalf of the Panama Canal Authority;

(4) 25 U.S.C. 450i(j), permitting a former employee who is carrying out official duties as an employee or elected or appointed official of a tribal organization or inter-tribal consortium to act on behalf of the organization or consortium in connection with any matter related to a tribal governmental activity or Federal Indian program or service, if the former employee submits notice of any personal and substantial involvement in the matter during Government service;

(5) 38 U.S.C. 5902(d), permitting a former employee who is a retired officer, warrant officer, or enlisted member of the Armed Forces, while not on active duty, to act on behalf of certain claimants notwithstanding 18 U.S.C. 207 if the claim arises under laws administered by the Secretary of Veterans Affairs;

(6) 50 U.S.C. 405(b), permitting a former part-time member of an advisory committee appointed by the Federal Emergency Management Agency, the Director of National Intelligence, or the National Security Council to engage in conduct notwithstanding 18 U.S.C. 207 except with respect to any particular matter directly involving an agency the former member advised or in which such agency is directly interested;

(7) 50 U.S.C. app. 463, permitting former employees appointed to certain positions under 50 U.S.C. app. 451 *et seq.* (Military Selective Service Act) to engage in conduct notwithstanding 18 U.S.C. 207; and

(8) Public Law 97–241, title I, section 120, August 24, 1982 (18 U.S.C. 203 note), providing that 18 U.S.C. 207 shall not apply under certain circumstances to private sector representatives on United States delegations to international telecommunications meetings and conferences.

NOTE TO PARAGRAPH (k): Exceptions from 18 U.S.C. 207 may be included in legislation mandating privatization of Governmental entities. *See*, for example, 42 U.S.C. 2297h–3(c), concerning the privatization of the United States Enrichment Corporation.

(1) *Guide to available exceptions and waivers to the prohibitions of 18 U.S.C. 207.* This chart lists the exceptions and waivers set forth in 18 U.S.C. 207 and for each exception and waiver identifies the prohibitions of section 207 excepted or subject to waiver. Detailed guidance on the applicability of the exceptions and waivers is contained in the cross-referenced paragraphs of this section.

Exception/waiver	Section 207 Prohibitions affected						
	(a)(1)	(a)(2)	(b)	(c)	(d)	(f)	(l)
(1) Acting for the United States, <i>see</i> § 2641.301(a) .....	•	•	•	•	•	•	•
(2) Elected State or local government official, <i>see</i> § 2641.301(b) .....	•	•	•	•	•	•	•
(3) Acting for specified entities, <i>see</i> § 2641.301(c) .....				•	•		
(4) Special knowledge, <i>see</i> § 2641.301(d) .....				•	•		



Exception/waiver	Section 207 Prohibitions affected						
	(a)(1)	(a)(2)	(b)	(c)	(d)	(f)	(l)
(5) Scientific or technological information, <i>see</i> § 2641.301(e) .....	•	•	•	•	•	•	•
(6) Testimony, <i>see</i> § 2641.301(f) .....	•	•	•	•	•	•	•
(7) Acting for a candidate or political party, <i>see</i> § 2641.301(g) .....	•	•	•	•	•	•	•
(8) Acting for an international organization, <i>see</i> § 2641.301(h) .....	•	•	•	•	•	•	•
(9) Employee of a Government-owned, contractor-operated entity, <i>see</i> § 2641.301(i) .....	•	•	•	•	•	•	•
(10) Waiver for certain positions, <i>see</i> § 2641.301(j) .....	•	•	•	•	•	•	•

### § 2641.302 Separate agency components.

(a) *Designation.* For purposes of 18 U.S.C. 207(c) only, and § 2641.204, the Director of the Office of Government Ethics may designate agency “components” that are distinct and separate from the “parent” agency and from each other. Absent such designation, the representational bar of section 207(c) extends to the whole of the agency in which the former senior employee served. An eligible former senior employee who served in the parent agency is not barred by section 207(c) from making communications to or appearances before any employee of any designated component of the parent, but is barred as to any employee of the parent or of any agency or bureau of the parent that has not been designated. An eligible former senior employee who served in a designated component of the parent agency is barred from communicating to or making an appearance before any employee of that designated component, but is not barred as to any employee of the parent, of another designated component, or of any other agency or bureau of the parent that has not been designated.

*Example 1 to paragraph (a):* While employed in the Office of the Secretary of Defense, a former career Senior Executive Service employee was employed in a position for which the rate of basic pay exceeded 86.5 percent of that payable for level II of the Executive Schedule. He is prohibited from contacting the Secretary of Defense and DOD’s Inspector General. However, because eligible under paragraph (b) of this section to benefit from component designation procedures, he is not prohibited by 18 U.S.C. 207(c) from contacting the Secretary of the Army. (The Department of the Army is a designated component of the parent, DOD. The Office of the Secretary of Defense and the Office of the DOD Inspector General are both part of the

parent, DOD. *See* the listing of DOD components in appendix B to this part.)

*Example 2 to paragraph (a):* Because eligible under paragraph (b) of this section to benefit from component designation procedures, a former Navy Admiral who last served as the Vice Chief of Naval Operations is not prohibited by 18 U.S.C. 207(c) from contacting the Secretary of Defense, the Secretary of the Army, or DOD’s Inspector General. He is prohibited from contacting the Secretary of the Navy. (The Department of the Navy is a designated component of the parent, DOD. The Office of the Secretary of Defense and the Office of the DOD Inspector General are both part of the parent. *See* the listing of DOD components in appendix B to this part.)

(b) *Eligible former senior employees.* All former senior employees are eligible to benefit from this procedure except those who were senior employees by virtue of having been:

(1) Employed in a position for which the rate of pay is specified in or fixed according to 5 U.S.C. 5311–5318 (the Executive Schedule) (*see* example 1 to paragraph (j)(1) of § 2641.301);

(2) Appointed by the President to a position under 3 U.S.C. 105(a)(2)(B); or

(3) Appointed by the Vice President to a position under 3 U.S.C. 106(a)(1)(B).

*Example 1 to paragraph (b):* A former senior employee who had served as Deputy Commissioner of the Internal Revenue Service is not eligible to benefit from the designation of components for the Department of the Treasury because the position of Deputy Commissioner is listed in 5 U.S.C. 5316, at a rate of pay payable for level V of the Executive Schedule.

(c) *Criteria for designation.* A component designation must be based on findings that:

(1) The component is an agency or bureau, within a parent agency, that exercises functions which are distinct and separate from the functions of the parent agency and from the functions of other components of that parent as

shown by relevant factors which may include, but are not limited to:

- (i) The component's creation by statute or a statutory reference indicating that it exercises functions which are distinct and separate;
- (ii) The component's exercise of distinct and separate subject matter or geographical jurisdiction;
- (iii) The degree of supervision exercised by the parent over the component;
- (iv) Whether the component exercises responsibilities that cut across organizational lines within the parent;
- (v) The size of the component in absolute terms; and
- (vi) The size of the component in relation to other agencies or bureaus within the parent.

(2) There exists no potential for the use of undue influence or unfair advantage based on past Government service.

(d) *Subdivision of components.* The Director will not ordinarily designate agencies that are encompassed by or otherwise supervised by an existing designated component.

(e) *Procedures.* Distinct and separate components shall be designated in accordance with the following procedure:

(1) *Agency recommendation.* A designated agency ethics official may, at any time, recommend the designation of an additional component or the revocation of a current designation by forwarding a written request to the Director of the Office of Government Ethics addressing the criteria set forth in paragraph (c) of this section.

(2) *Agency update.* Designated agency ethics officials shall, by July 1 of each year, forward to the OGE Director a letter stating whether components currently designated should remain designated in light of the criteria set forth in paragraph (c) of this section.

(3) *Action by the Office of Government Ethics.* The Director of the Office of Government Ethics shall, by rule, make or revoke a component designation after considering the recommendation of the designated agency ethics official. The Director shall maintain a listing of all designated agency components in appendix B to this part.

(f) *Effective dates.* A component designation shall be effective on the date

the rule creating the designation is published in the FEDERAL REGISTER and shall be effective as to individuals who terminated senior service either before, on or after that date. Revocation of a component designation shall be effective 90 days after the publication in the FEDERAL REGISTER of the rule that revokes the designation, but shall not be effective as to individuals who terminated senior service prior to the expiration of such 90-day period.

(g) *Effect of organizational changes.* (1) If a former senior employee served in an agency with component designations and the agency or a designated component that employed the former senior employee has been significantly altered by organizational changes, the appropriate designated agency ethics official shall determine whether any successor entity is substantially the same as the agency or a designated component that employed the former senior employee. Section 2641.204(g)(2)(iv)(A) through (g)(2)(iv)(C) should be used for guidance in determining how the 18 U.S.C. 207(c) bar applies when an agency or a designated component has been significantly altered.

(2) *Consultation with Office of Government Ethics.* When counseling individuals concerning the applicability of 18 U.S.C. 207(c) subsequent to significant organizational changes, the appropriate designated agency ethics official (DAEO) shall consult with the Office of Government Ethics. When it is determined that appendix B to this part no longer reflects the current organization of a parent agency, the DAEO shall promptly forward recommendations for designations or revocations in accordance with paragraph (e) of this section.

*Example 1 to paragraph (g):* An eligible former senior employee had served as an engineer in the Agency for Transportation Safety, an agency within Department X primarily focusing on safety issues relating to all forms of transportation. The agency had been designated as a distinct and separate component of Department X by the Director of the Office of Government Ethics. Subsequent to his termination from the position, the functions of the agency are distributed among three other designated components with responsibilities relating to air, sea, and

land transportation, respectively. The agency's few remaining programs are absorbed by the parent. As the designated component from which the former senior employee terminated is no longer identifiable as substantially the same entity, the 18 U.S.C. 207(c) bar will not affect him.

*Example 2 to paragraph (g):* A scientist served in a senior employee position in the Agency for Medical Research, an agency within Department X primarily focusing on cancer research. The agency had been designated as a distinct and separate component of Department X by the Director of the Office of Government Ethics. Subsequent to her termination from the position, the mission of the Agency for Medical Research is narrowed and it is renamed the Agency for Cancer Research. Approximately 20% of the employees of the former agency are transferred to various other parts of the Department to continue their work on medical research unrelated to cancer. The Agency for Cancer Research is determined to be substantially the same entity as the designated component in which she formerly served, and the 18 U.S.C. 207(c) bar applies with respect to the scientist's contacts with employees of the Agency for Cancer Research. She would not be barred from contacting an employee who was among the 20% of employees who were transferred to other parts of the Department.

(h) *Unauthorized designations.* No agency or bureau within the Executive Office of the President may be designated as a separate agency component.

#### APPENDIX A TO PART 2641—POSITIONS WAIVED FROM 18 U.S.C. 207(c) AND (f)

Pursuant to the provisions of 18 U.S.C. 207(c)(2)(C) and 5 CFR 2641.301(j), each of the following positions is waived from the provisions of 18 U.S.C. 207(c) and 5 CFR 2641.204, as well as the provisions of 18 U.S.C. 207(f) and 5 CFR 2641.206. All waivers are effective as of the date indicated.

*Agency: Department of Justice*

*Positions:*

United States Trustee (21) (effective June 2, 1994).

[73 FR 36186, June 25, 2008, as amended at 79 FR 2, Jan. 2, 2014]

#### APPENDIX B TO PART 2641—AGENCY COMPONENTS FOR PURPOSES OF 18 U.S.C. 207(c)

Pursuant to the provisions of 18 U.S.C. 207(h), each of the following agencies is determined, for purposes of 18 U.S.C. 207(c), and 5 CFR 2641.204, to have within it distinct and separate components as set forth below. Ex-

cept as otherwise indicated, all designations are effective as of January 1, 1991.

*Parent: Department of Commerce*

*Components:*

Bureau of the Census.

Bureau of Industry and Security (formerly Bureau of Export Administration) (effective January 28, 1992).

Economic Development Administration.

International Trade Administration.

Minority Business Development Agency (formerly listed as Minority Business Development Administration).

National Institute of Standards and Technology (effective March 6, 2008).

National Oceanic and Atmospheric Administration.

National Technical Information Service (effective March 6, 2008).

National Telecommunications and Information Administration.

United States Patent and Trademark Office (formerly Patent and Trademark Office).

*Parent: Department of Defense*

*Components:*

Department of the Air Force.

Department of the Army.

Department of the Navy.

Defense Information Systems Agency.

Defense Intelligence Agency.

Defense Logistics Agency.

Defense Threat Reduction Agency (effective February 5, 1999).

National Geospatial-Intelligence Agency (formerly National Imagery and Mapping Agency) (effective May 16, 1997).

National Reconnaissance Office (effective January 30, 2003).

National Security Agency.

*Parent: Department of Energy*

*Component:*

Federal Energy Regulatory Commission.

*Parent: Department of Health and Human Services*

*Components:*

Administration for Children and Families (effective January 28, 1992).

Administration for Community Living (effective December 4, 2014).

Agency for Healthcare Research and Quality (formerly Agency for Health Care Policy and Research) (effective May 16, 1997).

Agency for Toxic Substances and Disease Registry (effective May 16, 1997).

Centers for Disease Control and Prevention (effective May 16, 1997).

Centers for Medicare and Medicaid Services (formerly Health Care Financing Administration).

Food and Drug Administration.

Health Resources and Services Administration (effective May 16, 1997).

Indian Health Service (effective May 16, 1997).

**Pt. 2641, App. B**

National Institutes of Health (effective May 16, 1997).

Substance Abuse and Mental Health Services Administration (effective May 16, 1997).

*Parent: Department of the Interior*

Components:<sup>1</sup>

Bureau of Indian Affairs (effective January 28, 1992).

Bureau of Land Management (effective January 28, 1992).

Bureau of Reclamation (effective January 28, 1992).

National Park Service (effective January 28, 1992).

Office of Surface Mining Reclamation and Enforcement (effective January 28, 1992).

U.S. Fish and Wildlife Service (effective January 28, 1992).

U.S. Geological Survey (effective January 28, 1992).

*Parent: Department of Justice*

Components:

Antitrust Division.

Bureau of Alcohol, Tobacco, Firearms and Explosives (effective November 23, 2004).

Bureau of Prisons (including Federal Prison Industries, Inc.).

Civil Division.

Civil Rights Division.

Community Relations Service.

Criminal Division.

Drug Enforcement Administration.

Environment and Natural Resources Division.

Executive Office for United States Attorneys<sup>2</sup> (effective January 28, 1992).

Executive Office for United States Trustees<sup>3</sup> (effective January 28, 1992).

Federal Bureau of Investigation.

Foreign Claims Settlement Commission.

Independent Counsel appointed by the Attorney General.

Office of Justice Programs.

Office of the Pardon Attorney (effective January 28, 1992).

<sup>1</sup>All designated components under the jurisdiction of a particular Assistant Secretary shall be considered a single component for purposes of determining the scope of 18 U.S.C. 207(c) as applied to senior employees serving on the immediate staff of that Assistant Secretary.

<sup>2</sup>The Executive Office for United States Attorneys shall not be considered separate from any Office of the United States Attorney for a judicial district, but only from other designated components of the Department of Justice.

<sup>3</sup>The Executive Office for United States Trustees shall not be considered separate from any Office of the United States Trustee for a region, but only from other designated components of the Department of Justice.

**5 CFR Ch. XVI (1–1–16 Edition)**

Offices of the United States Attorney (each of 94 offices).

Offices of the United States Trustee (each of 21 offices).

Office on Violence Against Women<sup>4</sup> (effective March 8, 2007).

Tax Division.

United States Marshals Service (effective May 16, 1997).

United States Parole Commission.

*Parent: Department of Labor*

Components:

Bureau of Labor Statistics.

Employee Benefits Security Administration (formerly Pension and Welfare Benefits Administration) (effective May 16, 1997).

Employment and Training Administration.

Employment Standards Administration.

Mine Safety and Health Administration.

Occupational Safety and Health Administration.

Office of Disability Employment Policy (effective January 30, 2003).

Pension Benefit Guaranty Corporation (effective May 25, 2011).

*Parent: Department of State*

Component:

Foreign Service Grievance Board.

*Parent: Department of Transportation*

Components:

Federal Aviation Administration.

Federal Highway Administration.

Federal Motor Carrier Safety Administration (effective January 30, 2003).

Federal Railroad Administration.

Federal Transit Administration.

Maritime Administration.

National Highway Traffic Safety Administration.

Saint Lawrence Seaway Development Corporation.

Surface Transportation Board (effective May 16, 1997).

*Parent: Department of the Treasury*

Components:

Alcohol and Tobacco Tax and Trade Bureau (effective November 23, 2004).

Bureau of Engraving and Printing.

Bureau of the Fiscal Service (effective December 4, 2014).

Comptroller of the Currency.

Financial Crimes Enforcement Center (FinCEN) (effective January 30, 2003).

Internal Revenue Service.

<sup>4</sup>The Office on Violence Against Women shall not be considered separate from the Office of Justice Programs, but only from other designated components of the Department of Justice.

**Office of Government Ethics**

**Pt. 2641, App. B**

United States Mint (formerly listed as Bureau of the Mint).

**PARTS 2642–2699 [RESERVED]**

[73 FR 36186, June 25, 2008, as amended at 76 FR 30246, May 25, 2011; 79 FR 71957, Dec. 4, 2014; 80 FR 56894, Sept. 21, 2015]